TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 306

THE CHESAPEAKE & OHIO RAILWAY COMPANY, PETITIONER,

vs.

ANNIE NIXON, ADMINISTRATRIX OF THE ESTATE OF SAM JOE NIXON, DECEASED

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

PETITION FOR CERTIORARI FILED MARCH 7, 1925

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[fol. 1] **IN SUPREME COURT OF APPEALS OF VIRGINIA, AT STAUNTON**

THE CHESAPEAKE & OHIO RAILWAY CO., Plaintiff in Error,

vs.

ANNIE NIXON, Admrx. of Sam Joe Nixon, Defendant in Error

PETITION

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

Your petitioner, The Chesapeake & Ohio Railway Company, presents herewith a transcript of the record in an action at law brought against it by Annie Nixon, administratrix of Sam Joe Nixon, deceased, in the Circuit Court of Nelson County, to recover damages for the death of the said Sam Joe Nixon, which occurred on the 21st day of June, 1921, and was caused as alleged through your petitioner's negligence by his being struck by one of your petitioner's freight trains while he was riding on a velocipede on the petitioner's track to the place where he customarily began his day's work as section foreman, and your petitioner respectfully represents that it is greatly aggrieved by a judgment for $12,000.00 rendered against it in said action on the 9th day of June, 1923.

The notice of motion under which the action was brought contains 12 counts, the first 8 under the State statute and the remaining 4 counts under the Federal Employers' Liability Act. In all the several counts the deceased was classified as a licensee invitee and employee engaged in either interstate or intrastate commerce. As the recovery ($12,000.00) was under the Federal Statute, only the last 4 counts are pertinent, so far as this court is concerned. In these counts the Petitioner was charged with negligence in the failure of [fol. 2] the engine crew to keep a lookout (count 9); in their failure to give him warning of the approach of the train (count 10); in their failure to keep a constant lookout ahead as required by the rules of the Company (count 11); and in their failure to avoid the injury under the theory of the last clear chance (count 12).

This case was twice tried in the court below, the first trial resulting in a verdict for the plaintiff for $10,000.00, which the Court set aside as contrary to the law and evidence and without evidence to support it. Upon the second trial, which resulted in the judgment complained of, the court overruled the petitioner's motion to set aside the verdict as contrary to the law and evidence and without evidence to support it and to enter a final judgment for the defendant, and entered the judgment complained of, and the action of the court in overruling this motion is assigned as error.

I

The Court Erred in Overruling the Motion to Set the Verdict Aside and Enter Final Judgment for Petitioner

The plaintiff's intestate, Sam Joe Nixon, had for a long time prior to the date of his death, on June 21, 1921, been in the employ of your petitioner (who will for convenience be referred to as the defendant) in the capacity of section laborer, and later as section foreman. At the time of the accident complained of he was employed as such on the James River Divisions of the defendant company; his section extending from Warminster on the east, at about mile post 99, to Wingina on the west, about mile post 105. He and his family were occupying a house owned by the defendant, located adjoining the right of way which he rented from the defendant. This house was situated on the said section near mile post 101, about a mile and a quarter east of Midway Mills, where was located the tool house, at which point the deceased every morning met his gang of section laborers and commenced work for the defendant in the maintenance of its track, his hours of employment being from 7 a. m. to 4 p. m. The physical situation is more clearly shown by the maps filed herewith, by consent of parties, the defendant's maps being designated as 5711 and 5711-A.

[fol. 3] The deceased was found dead by members of the section force on July 21, 1921, about 7:20 a. m., lying about 8 feet from the north rail of the track at a point 1967 feet west of the Nixon house. His watch had stopped at 6:35 a. m. The section force had assembled at the tool house ready for work at 7 a. m., as was their custom, and after waiting a few minutes for the deceased, who did not appear, they put the tool car on the track and proceeded toward his home to find out why he had not come. They moved slowly on until they found his body, about 8 or 10 feet from the track, on the north side, as stated above, lying in the weeds on the canal bank, his body parallel with the rail (record pp. 170, 193, 241, 281 and 297), and near him were found three buckets, identified as his dinner bucket, milk bucket, and bran bucket, which the deceased was carrying at the time of his death (record pages 224 and 264). There was also a large quantity of bran scattered over the track near the scene of the accident, which was seen there by disinterested witnesses (record p. 227). The relevancy of the evidence concerning the buckets and bran will later appear in connection with the discussion of the refusal of the defendant's instruction D-1. The plaintiff claims to have witnessed the accident from the front porch of her house, but her testimony is shown to be in conflict with physical facts which made it impossible for her to see what she claims to have seen. No other witness claims to have seen the accident or to have any knowledge of the circumstances under which it occurred.

The plaintiff testified (record pp. 3 et seq.) that on the morning of June 21, 1921, at 6:30 o'clock she accompanied her husband from the house where they lived down to the track a distance of 29 steps; that it had been his custom for some time past to make use of a

velocipede belonging to the defendant company for the purpose of getting to and from his work; that he always began at 7 a. m., at the tool house at Midway Mills and ended at the same point at 4 p. m.; that the velocipede was used during the day by the track walker for the purpose of going over this section of track, and that the deceased had been permitted to use it in going to and from his work. On the morning in question when he reached the track he put the velocipede on it and after looking and listening in both directions he started westward toward Midway Mills. After telling him good bye she turned around and went back to the porch of the house, "about [fol. 4] a second's walk," and when she got up on the porch her attention was attracted by a west bound train. Before reaching the porch she had noticed that her husband had gotten as far west as the farm bridge or farm crossing shown on the map, about 1300 feet west of the house, and had in the meanwhile looked back *once*, apparently to see if a train was approaching him, but after that time he did not look back at all. As soon as she got on the porch she saw the train approaching from the East just around the bluff, which was about 1500 feet east of the house, and her attention was at once attracted to it "by the way it was speeding." The train came up to the house "almost in the snap of your finger," flashed by her and proceeded westward. And then, according to her testimony, she stood on the porch and continued to watch the train until she saw her husband "thrown off the track over on the bank" (record pp. 6 and 8). The only explanation she could give of her failure to warn her husband of the approaching train was that she was "so unnerved" (record p. 6). She admitted that when the train got on the straight track to the west of her "she could not see the track in front of the train," that the "engine and train cut off her view, hid him from her view" (record pp. 26-28). Notwithstanding her admission that her view of the deceased was cut off by the engine and train and that "she could not see him when the train hit the car" (record p. 27), she claimed to have seen him "thrown off the track over on the bank," and stated that she was "satisfied he was killed" (record p. 28).

The plaintiff further testified that when she saw her husband "thrown off the track" she was standing on her front porch, and immediately "fell in a faint," with her baby in her arms, and there she lay until she regained consciousness (record p. 28); that she then went in and laid down on the bed for a few moments, and then later went out into the yard, where she was walking calmly around when the section force came and notified her of her husband's death (record p. 32). This was almost 7:30 o'clock. When the deceased was found two of the section men were detailed to remain with the body and the other four went on to notify his wife and to send a message from Warminster to the railway authorities. As they approached the Nixon house they saw the plaintiff walking out in the yard exhibiting no signs of motion or agitation, and when they told her that her husband was dead she exclaimed "Is he really dead? [fol. 5] Oh, Lord, what am I to do?" (record p. 260). In response

to her request that someone be left with her, one of the men was detailed for that purpose, and she immediately sent him to notify a neighbor, Mrs. West. Despite the fact that she claims to have seen her husband "thrown from the track" by the speeding train, at about 6:35 a. m., she did not inform anyone of the fact or herself go to his assistance. She did not mention to the negro girl who was in her employ and was then present with her in the house that she had seen her husband knocked off the track by the train, nor ask her to run to the assistance of the stricken man, or seek the help of the neighbors. She spent almost an hour after "seeing him thrown off the track" without saying a word about it to the only other adult member of her household or sending for assistance. When she saw the section men approach she was walking calmly to and fro in the yard (record pp. 261 and 218). These men were the possible bearers of news about her husband's condition but not a word did she say to them nor a question did she ask them until they informed her of her husband's death, of which fact she was already "satisfied." When she was actually told that her husband had been killed she at once sent for assistance, and when her neighbors Mrs. West and Mrs. Desper came she told them that "she hadn't seen her husband get off the track" (record pp. 125, 282).

Division Engineer F. W. Droste, testifying for the defendant, introduced in his testimony the two maps above referred to, which he prepared especially for the purpose of showing the physical situation at the point of the accident. The map marked "5711" covers the two miles of track in question, and the other, "5711-A," shows on a large scale the territory between the Nixon house and the point of accident. Both of these maps are drawn to scale—the first 200 feet to the inch, and the latter 50 feet to the inch. The latter map was prepared especially for the purpose of showing the visibility of the scene of the accident from the porch of the Nixon house. On this latter map there is shown on the track at two places a train composed of an engine, 10 cars and a caboose (which composed the train supposed to have struck the deceased), all drawn to scale, to represent on the map the actual scene as it was enacted at the time of the accident, and to show graphically what this witness and other witnesses testified to verbally, namely: that after the engine rounded the curve about 500 feet west of the Nixon house and came upon the straight [fol. 6] track where the accident took place, it then became a physical impossibility for a person standing on the porch of the Nixon house (as the plaintiff claims she was doing) to see the point of accident or a point closer than 20 feet of the rail at that point. In consequence of this fact the plaintiff could not possibly have seen her husband thrown from the track, as she claims to have seen him. Not only does this fact appear conclusively from the map in question, but it is also clearly shown from the testimony of witnesses who actually stood on the porch of the house while a train proceeded to the point of accident (record pp. 76, 87, 115, 286 and 298).

At the time the deceased was lost to view the train was 1,350 feet from the point where he was found, and from that time until he

was found shortly after 7 o'clock he was never seen again. What he was doing, and under what circumstances he came to his death are wholly matters of speculation and surmise.

Even though the court be considering the matter as upon demurrer to the evidence notwithstanding the verdict of the jury to the contrary, the court is not bound to believe that which can be shown to be incredible and unworthy of belief. As was said by this court speaking through Harrison, J., in N. and W. Rwy. Co. v. Strickler, 118 Va. 155:

"This court has repeatedly declared that courts are not required to believe that which is contrary to human experience and the laws of nature or which they judicially know to be incredible. Though the case be heard as upon a demurrer to the evidence, the court will not stultify itself by allowing the verdict to stand although there may be evidence tending to support it when the physical facts demonstrate such evidence to be untrue and the verdict to be unjust and unsupported in law and in fact."

Citing Southern Rwy. Co. v. Wiley, 112 Va. 183.

We submit that the deceased was not seen and could not have been seen by the plaintiff as claimed, after the train which is supposed to have struck him passed the Nixon house and came on to the straight track beside which he was later found.

[fol. 7] The plaintiff further testified that during the brief interval of time when the interior of the engine drawing the train in question was visible to her as it went by "like a flash," she saw the engineer and fireman down on the deck of the engine "talking and laughing together" (record p. 5). This impression she gained from the fleeting glimpse of the passing engine while it traversed a distance of 20 feet (record p. 19) at a speed which she estimates at from 30 to 50 miles an hour (record p. 9). The plaintiff's statement that at the time when this train passed her house "like a flash" (record p. 17) she saw the crew at play on the deck of the swiftly moving engine challenges belief. The engineman and fireman in charge of the train in question were men of long service and good standing with the railway company by whom they were employed and it is inconceivable that they would have chosen such a time and place to "play" and thus jeopardize their lives, not only of themselves but of the remainder of the crew. To say that two experienced, reliable men engaged in the operation of a train of cars had deserted their respective posts and begun to "play" in the narrow confines of the engine cab, is to assert what is contrary to "human experience" and the natural instinct of self preservation. The plaintiff's own testimony shows that her opportunity for observation was extremely limited. The opening between the engine and the tender through which she is supposed to have seen this astonishing event was not over 3 feet in width. The engineman, in response to a question as to how much space there was between the engine and tender, replied: "About the width of me. I can stand up in there and the tender

will touch me and the cab will touch me" (record p. 357). Had the engineman been in a position to have been seen, he would necessarily have cut off the view from anything beyond him. Assuming that the train was running at the rate of 25 miles an hour, as was testified to by the engineer, it would have been moving at the rate of 36 feet per second, and in the space of 20 feet, which the plaintiff says was afforded her for the glimpse that she got, she would have had but a fraction of a second within which to witness these men "laughing and playing." The engineman and fireman denied this testimony, and stated that at the time in question (when passing the Nixon house) they were engaged in the performance of their respective duties. The engineman (Reardon) testified (record p. 341) that at the time when the train was passing the Nixon house (about [fol. 8] 1,967 feet east of the point where the deceased was found), having no reason to anticipate the presence of anyone on the track and there being no crossings for nearly two miles, he had made use of this opportunity to give the necessary attention to the lubricating mechanism of the engine. The duty involved the inspection of a device known as the lubricator, which was located in the top of the engine cab, the function of which was to furnish oil to the rapidly moving pistons and valves on the locomotive. In order to verify that the engine was being properly lubricated and to give it the necessary amount of oil to insure its lubrication, he had to make an inspection of this mechanism and adjust the flow of oil in the lubricator, which could only be done by standing up on his seat and using an electric light. The engineman testified that the performance of this necessary duty occupied him one or two minutes and that he was so engaged as he passed the Nixon house. In anticipation of attending to this necessary duty, he had chosen a locality where he knew there were no crossings and where no travelers could be expected at that time of the morning; and he took the further extra precaution before mounting his seat to blow the whistle of the engine. When he resumed his seat again (after the lapse of a minute or two) he was in sight of Midway Mills, the train having in the meanwhile passed the Nixon house and the point where the deceased was found. During this time the fireman testified that he was engaged in the performance of the necessary duties in connection with the firing of his engine, which required his constant attention to the mechanical stoker which performed that work. By reason of his attention to these duties he was not maintaining a lookout. Neither the engineman nor the fireman knew until the train reached the division point at Gladstone that a man had been struck and killed, where for the first time they learned that fact.

The defendant cannot be charged with negligence under any circumstances for failure to keep a lookout when the engineer and fireman are engaged in the performance of other necessary duties in running the train. Director General of Railroads v. Hubbard's Admr., 132 Va. 193; Stuck v. K. & M. Ry. Co., (W. Va.), 86 S. E. 13.

The plaintiff's case, therefore, is in brief one in which the intestate

was found dead beside the track with injuries apparently inflicted by collision with an engine, but what he was doing at the time or why he failed to hear the approaching train (which was distinctly heard by [fol. 9] other witnesses more than a mile distant. (Record pp. 126 and 284) are matters of conjecture. It is true the plaintiff attempted to explain the failure of the deceased to hear the whistle, or the noise of the approaching train by introducing testimony to show that on the morning in question a strong west wind was blowing which would have the effect of blowing away from the deceased the sound of the approaching train (record pp. 49, 61, 64). The wind was described as a "keen wind" or a "strong west wind." Despite these statements there are two physical facts which show that this testimony, even though immaterial, bears the unmistakeable signs of having been manufactured. The witness West was cutting wheat on the morning of the accident with a mechanical device on his mower which he states could not have been used if the wheat had been disturbed by the wind (record p. 113). Another witness, Mrs. Desper, who was a neighbor of Mrs. Nixon, and who, learning of the accident, went down to render such assistance as she could, placed an umbrella over the face of the deceased where he lay. She states that there was not enough wind blowing to disturb the umbrella (record, p. 280). All the witnesses agree that it was a bright, sunny, cloudless morning in june.

The unreliability of the plaintiff's testimony throughout this case is further shown by the contradictions in which she became involved in the attempt on the second trial of the case to improve her testimony given at the first trial. At the former trial she testified that after she had seen the train approaching she had seen her husband look back several times (record p. 25). This proved embarrassing when confronted with the question why she did not give him some signal of the approach of the train. Accordingly, at the later trial, she said she saw him look back only once, and before she saw the train. At the former trial she testified that when the section men came and told her of her husband's death she was lying on the bed in the house, prostrated by having witnessed the accident (record p. 33). On the second trial she admitted (as the evidence overwhelmingly shows) that she was in the yard at the time.

These, and other inconsistencies, she attributes to "nervousness" and "excitement."

The only testimony in this case tending in any way to support a charge of negligence is the incredible statement of the plaintiff herself that when the engine passed the Nixon house the engineer and [fol. 10] firemen were on the deck of the engine "laughing and playing." Except for this statement, no negligence bearing on the accident is proved against the defendant or any of its officers, agents or employees. This alleged scene was witnessed "in a flash" at a point 1,967 feet distant from the point where the deceased was found, but whether the engineer and fireman ceased playing and resumed their respective posts of duty before the accident occurred, or what they did after the train "flashed by" she did not know. The ques-

tion of negligence, therefore, in this case is purely a matter of conjecture and speculation growing out of the fact that the deceased was found dead near the railroad track and under circumstances which raised the presumption that he had been struck by a passing engine.

This case is strikingly analogous to that of Southern Railway Co v. Adams, 129 Va. 233, and the case of Southern Railway Co. v. Hall, 102 Va. 137, therein cited. In the former case Adams, who was a section laborer of the Southern Railway Company, was walking northwardly on the tracks of the Southern Railway to Orange where he shortly expected to commence his day's work. When last seen he was about 400 yards from the point where the train supposed to have killed him came in sight and about 55 yards from the point at which he was struck. He was later found dead beside the track with injuries that might have resulted from being struck by a train and it was shown that a passenger train running north passed the witnesses who had met Adams just 55 yards beyond. Upon these facts the court by Saunders, J., concluded its findings for the defendant as follows:

"The track was straight and the view unobstructed. The witnesses who met Adams did not place him within or outside of the rails. They speak of themselves as walking on the track and Adams as meeting them on the same track. Certainly the injuries described by the coroner do not indicate that Adams was walking on the track between the rails and in that situation was overtaken by the train and struck down or hurled aside by the pilot. We might pursue in the case in judgment a like course of speculation and surmise with respect to the circumstances of the death of young Adams as appears in the extracts cited supra from Hall's case and Smith's case and [fol. 11] reach a like indeterminate conclusion. These exercises of the imagination would fail to afford any solid and satisfactory finding that reason would approve. The books abound in cases in which it clearly appears that the injuries complained of are traceable to the sole and exclusive negligence of the party injured. Common knowledge advises us to the same effect. Hence, unless the circumstances of an accident are measurably revealed by the evidence it is impossible to fix the responsibility of a defendant by the processes of reason and in such an extremity we are forbidden by the established rules of law to draw an inference from a presumption."

To the same effect is Southern Ry Co. v. Hall, 102 Va. 135, which is cited at length by the court in the opinion in the Adams case.

Neither the testimony of the plaintiff that the crew were seen down on the deck of the engine "laughing and talking," nor the testimony of the crew that they were prevented from maintaining a lookout by attention to other necessary duties about the engine, can supply this want of proof of the situation and circumstances of the deceased at the time of the injury. It cannot be said that the failure on the part of the engineer to keep a lookout contributed proximately to this injury. If the engineer had been looking out we can only

eculate as to what he would have seen or in what place or condition
would have found this unfortunate man. Nor can the court say
what means or under what circumstances he came to his death,
hether he was off the track and then attempted to remove his
elocipede, whether he was killed in getting clear of the track, or
hether when clear he got too close to the moving train and was
truck. All of these essential facts remain in the realm of con-
ecture.

On the necessity of proving negligence, this Court, in the recent
ase of Davis, Director General v. Souder, 134 Va. at page 361, by
udge West, said as follows:

"Negligence, when alleged, must be proved by direct or circum-
stantial evidence and must not be left to conjecture or random
guess. * * * In the case of Looney v. Metropolitan R. Co., 200
U.S., 480, the law is stated thus: 'In an action for damages for per-
[fol. 12] sonal injuries * * * the plaintiff must establish the
ground of the defendant's liability. * * * Negligence of the defend-
ant will not be inferred from the mere fact that the injury occurred,
or from the presumption of care on the part of the plaintiff. There
is equally a presumption that the defendant performed his duty.'"

We confidently submit, therefore, that the plaintiff's case must clearly fail from want of proof and that the trial court erred in not sustaining the defendant's motion to set the judgment aside and to enter final judgment for the defendant.

II

Assignments of Error to the Action of the Court in Giving and Refusing Instructions

The Court erred in giving plaintiff's instructions 2 and 3.

Instruction 2 defined the defendant's duty of lookout for licensees, declaring that the duty extends along the track in front of a moving engine for a sufficient distance ahead to enable the engineman to stop the train should he discover a licensee on the track "apparently unconscious of his danger from the approaching train who apparently will take no steps to secure his own safety."

Instruction No. 3 embodied the doctrine of the last clear chance, and is as follows:

"The Court instructs the jury if you find from the evidence that the said Sam Joe Nixon was a licensee at the time of his death, and if you further find from the evidence that the servants in charge of the engine in question ought to have discovered by the exercise of reasonable care in keeping a lookout for licensees on the track the said Sam Joe Nixon, and if you further find that had the said servant or servants exercised the said reasonable care Sam Joe Nixon would have been discovered in a position of peril from the approaching train and that the said Sam Joe Nixon at the time he ought to

[fol. 13] have been discovered was unconscious of the approaching train and remained unconscious of the approaching train up to the time of the collision causing his death, and that the said servant or servants ought to have discovered the said Sam Joe Nixon at a sufficient distance to have warned him of his peril, by bell or whistle, or to have stopped the train if necessary in time to have avoided injuring him, you should find for the plaintiff."

There being no evidence in the record that the deceased was "unconscious of the approaching train and remained unconscious of it up to the time of the collision," it was error prejudicial to the defendant to allow the jury the opportunity thus to find for the plaintiff when at best they could merely speculate and theorize about the condition of the deceased from the time when he might have been seen by the engineman until the time when he was struck.

A case in point is that of Southern Ry. Co. v. Mason, 119 Va. 256, in which the plaintiff sued for injuries received by being struck at a highway crossing while driving his team across it. The trial court upon its own motion instructed the jury that the failure of the plaintiff to look and listen at the crossing was such contributory negligence as would bar his recovery "unless the defendant after seeing the horse driven by the plaintiff upon its track or could have seen him by the exercise of due care, failed to exercise all proper means to avoid the accident." The Court, by Kelly, J., deemed this action on the part of the trial court reversible error.

"The error in this instruction consists in the fact that it submits to the jury the issue or theory of discovered peril or last clear chance without any evidence whatever upon which to base it. The established facts, without any semblance of conflict, show that the defendant, to quote substantially from the instruction, 'after seeing the horse driven by plaintiff on its track or after it could have seen him by the exercise of due care' could not by any possibility have averted the accident. In this state of the case it was error to give the instruction." Cases cited.

We, therefore, submit that the trial court erred in giving instructions 2 and 3, either of which allowed the jury to find for the plain-
[fol. 14] tiff under the doctrine of last clear chance when there was no evidence upon which to base such a finding.

The Court erred in giving plaintiff's instruction No. 6.

The instruction is as follows:

"The Court instructs the jury it is the duty of the engineer so far as consistent with his other duties to keep a lookout ahead for licensees and servants at such times and places as they may be expected to be on the track and if for any reason the engineer cannot keep a lookout, he should require the fireman to keep a lookout if, in the exercise of reasonable prudence, such requirement is necessary."

The objectionable part of this instruction requires the engineman to put the fireman on lookout when the former is engaged in other duties. This error was clearly set forth in the case of Director General of Railroads v. Hubbard's Admr., 132 Va. 193. It was shown in evidence in that case that the point of accident was not visible to the engineman, by reason of a curve in the track, and at the time the fireman was attending to the firing of his engine. There the Court held that it is the duty of the fireman primarily to fire his engine, and his employer cannot be held guilty of negligence for not requiring him to keep a lookout at a time when his duties require him to be firing. In the Hubbard case the engineman could not see the track ahead by reason of a curve in it. In the case at bar the engineman could not see the track by reason of his attention to other duties. If, in the one case, it was not necessary to require the fireman to maintain a lookout when, by reason of the curve, the engineman could not see ahead, and to that extent no lookout was being maintained, it is not necessary, for the same reasons, to require the fireman to keep a lookout when the engineman is prevented from keeping a lookout by reason of his attention to the mechanism of his engine.

Furthermore, the statement of law embodied in this instruction has no application to the facts of this case. The evidence does not show that this early hour of the morning and this particular locality [fol. 15] were such time and place as licensees and servants might be expected to be on the track. On the contrary, the evidence shows that this locality was in a farming section where persons walking on the track were very rarely seen. (Record pp. 133, 160, 174, 184, 189, 196, 204*, 175, 222, 246, 265, 274, 285, 301.) The engineman testified that the locality was rarely travelled (Rec. p. 355); that at the time of the accident it was 25 minutes before the trackmen would begin work, and that he had no reason to anticipate anyone on the track at all. This evidence is uncontradicted. We submit, therefore, that there was no evidence upon which to justify the giving of the instruction.

The Court erred in refusing defendant's instruction D-1 and in modifying its instruction D-12.

The greater part of the testimony adduced on behalf of the defendant had for its purpose to show that on the morning that he was killed the deceased was then on his way to perform some mission of his own before commencing his day's work, his mission being to feed and milk his cow which he kept in a pasture near the tool house where his day's work began; and that, being on his way to do his own work he was not, at such length of time before he was due to commence work for the defendant company, engaged in commerce, either interstate or intrastate, nor had the relation of master and servant then obtained, nor was he then in the line of his employ. When the deceased was found, his watch had stopped at 6:35. (Record p. 28). He had left home at about 6:30, had gone about 2,000 of the 6,000 feet intervening between his home and Midway Mills, about one-third of the distance, in five minutes time. Therefore, at this rate of speed,

he would have reached Midway at 6:45 at the latest, where, according to the overwhelming testimony of defendant's witnesses, he customarily went over into an adjoining pasture and milked his cow. The six men who worked under the deceased as section laborers all testified that he customarily reached the tool house, where they commenced their day's work, at least fifteen minutes before 7 o'clock, when they actually began work, and devoted this interval of time to milking his cow. This fact was also testified to by the witnesses T. J. West, Ottie Branch, J. W. Turner, R. A. Dunn and A. N. Ragland, all of whom were introduced for that purpose. At the time the deceased was found beside the track, these section laborers saw and [fol. 16] identified there his dinner bucket, bran bucket and milk bucket, all of which were then lying near where he was found. Two of these buckets were actually produced at the trial of the case. Another witness, A. N. Ragland, further testified that he visited the scene of the accident on the morning that it happened and that he saw bran scattered on the track (p. 315). In all, no less than eleven witnesses testified that the deceased was in the habit of milking his cow every morning before going to work. This testimony, together with the fact of his probable arrival at Midway on the morning of the accident about fifteen minutes before his time for commencing work, the presence of bran scattered about at the scene of the accident, and the presence of the bran bucket and milk bucket there, all point unmistakably to the conclusion that on the morning in question the deceased was not on his way to work at the time when he was struck and killed but was on his way to attend to some business of his own which completed he would report for duty at 7 A. M. While travelling along the track he was, it is true, on his way to the point where later his duties would commence, but it could hardly be said that at the time the relation of master and servant had obtained and that he was then engaged in the performance of any acts which contributed in any degree to interstate commerce. In any event, the question whether he was then engagd in interstate commerce was, we submit, a question of fact to be decided by the jury under proper instructions from the Court, and the Court having instructed on the plaintiff's theory of the case should also have given the defendant an instruction presenting its theory. N. & W. Railway v. Stone, 111 Va. 730.

The defendant asked for an instruction to the effect that if the jury believed that "the deceased at the time of his death was on his way to Midway to milk his cow, according to his daily custom, and that he was not to go to work for the defendant company until he had completed this work of his own, the said deceased during the time he was proceeding from his home to Midway was not in the employ of the defendant company," and that in consequence if they find him guilty of negligence in not looking out for his own safety which contributed to the injury they must find for the defendant.

The foregoing instruction presented to the jury the defendant's theory of the case, namely, that in order for the plaintiff to recover [fol. 17] for the death of the deceased as an employee it must be shown that the relation of master and servant had begun at the time

of the injury; and that if the jury believe that during the time when he was on his way to the point where later he was to go to work but before going to work he expected to leave the master's premises, then until he was necessarily on the premises pursuant to his contract of employment he was not an employee and could not recover as such; and since he was not an employee the defense of contributory negligence was applicable to him. This proposition is clearly enunciated in Roberts' Federal Liability of Carriers. (Page 788.)

"Assuming that the employee was either returning from or going to work for the company in interstate commerce, the question as to whether he was engaged in interstate commerce while so going to or from his work will depend upon the further question as to when the relation of master and servant commences or ends as the case may be, and the solution of this problem must be made in the light of common law decisions applicable. The relation of master and servant, in so far as the obligation to protect the employee is concerned, begins when the employee is necessarily on the premises of the master pursuant to his contract of employment." Citing Fletcher v. B. & O. Railroad, 168 U. S. 135, and other cases.

Assuming that the employee was either returning from or going to work for the company in interstate commerce, the question as to whether he was engaged in interstate commerce while so going to or from his work will, as stated in the authority above quoted, depend upon the further question as to when the relation of master and servant commences or ends, and will be determined by the decision of the question as to whether or not at the time of the injury the employee was necessarily on the premises of the master pursuant to his contract of employment.

As shown above, the deceased at the time of this injury was making use of a velocipede, the use of which he had requested and was given for the sole purpose of riding to and from his work for his own convenience. The fact that he was on the track and on the [fol. 18] velocipede at this hour in the morning was of his own choosing and for his own convenience. He was not, as the plaintiff attemps to show, at that time on the premises pursuant to his contract of employement. The plaintiff attempted to prove that if at any time in passing over the track he had found anything wrong, it would have been his duty to stop and correct it. Granting that this is true, it has not been shown that at this time he had found any such defect or was in the act of correcting it or that the situation in any way changed his obligation to report for duty at 7 A. M. Not until that time was he necessarily on the premises of the master pursuant to his contract of employment. To hold otherwise would be to make him continuously in the employ of the master by reason of the fact that he resided on the master's premises and used them in going to and from his work. To carry this theory to its logical conclusion would be to hold the master responsible for the protection of the employee at all hours of the day or night, whether he was making use of the master's premises for his own purpose or otherwise.

A case strikingly in point is that of Pryor v. Bishop, 148 C. C. A. 25. There the deceased was a brakeman in the employ of the Wabash Railway, for which Pryor was receiver, and had completed a run at Chicago. Their next run out began at Landers, about five miles distant, which could have been reached by street cars, or they might have remained in the caboose, in which they rode while performing their duties, which would be taken across by a transfer train. They remained in the caboose, and while being transferred across, it was struck by an engine and the deceased was killed. At the time of this injury, the deceased had not been called for duty, though he was next in line for service, and would not actually have gone to work for three or four hours after he should have reached Landers, the place where his run commenced. Suit was brought to recover damages for his death while employed in interstate commerce. The Court denied the right to recover, saying,

"Plaintiff's claim that, by the hitching on of the caboose in question to the transfer train, decedent's crew was called, and that his interstate service had thus actually begun, does not commend itself to our judgment. It was not, nor was it intended as such. Clearly the crew had not started upon their home run. Neither does it ap- [fol. 19] pear from the evidence that the caboose and train crew were at the place of injury for the benefit of defendant, or that they were wanted there at the time, or that there was any understanding that they would be at or near Landers at or near that time, or that they were at the place of the accident with other right than the mere sufferance of the defendant, that being the most convenient way for them to get to Landers and secure sleep and other accommodations for the night, or that they were under any expectancy of call, or that their acts in the premises had any bearing upon interstate commerce, or that the facts of the case brought the decedent within the provisions of the Federal Employers Liability Act.

"We are unable to discover from the evidence or the law upon what ground plaintiff's decedent's presence at or near Landers at the time of the accident can be said to have been a step in the performance of any actual service to defendant in interstate commerce. He was there in no sense *other* the direction of defendant growing out of the relation of master and servant. As was said in Illinois Central R. v. Behrens (233 U. S. 473):

" 'That he (the servant) was expected, upon the completion of that task (moving intrastate cars), to engage in another which would have been a part of interstate commerce, is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury.'

"To hold that decedent was, at the time of the injury—some 4 or 5 hours before he was wanted by the defendant—employed in interstate commerce, would practically make the defendant liable to him as engaged in interstate commerce at all times. Such is not the purpose of the act. The statute was enacted only with reference to those railroad employees who, while in the discharge of their duties in interestate commerce, are injured."

The case at bar is not one where, upon conflicting evidence the re-
[fol. 20] spective theories of plaintiff and defendant have been fairly submitted to the jury. Even if such were the case, it is hard to see how, under the evidence, a verdict for the plaintiff could stand—but the defendant has never had its opportunity to present its theory of the case to the jury. If the defendant can substantiate its defense with proper proof, then the intestate was, at the time of the accident, not occupying the status of employee. Being such, he is barred from recovery by his contributory negligence, which under the instructions would only operate to mitigate the damages.

This theory of the case the defendant also embodied in its instruction (given, in an amended form, as No. 12) as follows:

"The Court instructs the jury that if they believe from the evidence that at the time of the accident in question the deceased was riding on a velocipede with the consent of the railway company, but not at the time engaged in the performance of any duty within the scope of his employment, and that the deceased, by the exercise of ordinary care could have seen or heard the train approaching him in time to have avoided the accident, and failed to do so, such failure on his part to take the necessary precautions for his own safety is contributory negligence and will bar his recovery in this action."

The effect of this instruction was entirely nullified by the addition made to it by the Court,

"But this instruction must be read in connection with Instruction No. 3,"

which engrafted upon it the doctrine of last clear chance, to the defendant's prejudice, as shown above.

The action of the Court, we submit, in refusing to give defendant's instruction D-1, and the modification of its instruction No. 12 by the addition hereinbefore quoted, operated to the prejudice of the defendant and, we submit, constitute error prejudicial to the defendant.

[fol. 21] The Court erred in refusing defendant's instruction D-2.

As stated above, the only act or neglect of the defendant company which the evidence tended in any degree to substantiate was the failure of the engineman and fireman to be maintaining a lookout ahead of the moving engine at the time of the accident. The evidence of the plaintiff on this point was only that of the plaintiff herself, and her testimony was only as to what she saw in the fleeting glimpse caught of the engine and its crew while the engine passed her house, 1900 feet east of the point of the accident. This is not in conflict with the testimony of the engineman. Whatever he might have been doing when the train passed her, he yet had ample time to have mounted his seat for an inspection of the lubricator. At this point the engineman had no reason to think that his temporary abandonment of his lookout would jeopardize

his train or anyone on the track. There were no road crossings for a mile or more. He had never seen anyone walking the track at this point, nor had he cause to think that anyone, trespasser, licensee, or employee, would be on the track at that hour. And even if it had been the hour when employees might have been expected, he had a right, we submit, to assume that they would be on the lookout for the approach of trains, and would have the track in safe condition for the train. There was all the more reason to expect that they themselves would be safely out of the way of the train.

The engineman and fireman both testified that it was customary and usual for the engineman to leave his position of lookout when it became necessary to give attention to the mechanism of the engine, and that it frequently happens that when this is the case, the engine proceeds for short periods of time without any lookout being maintained. In selecting the time and place for doing this work the engineman took the precaution to select a place, such as this locality, where there are no road crossings and no signals to be observed and where there was apparently no possibility of injury to persons on the tract (pp. 238, 362, 376). In this case, both of these men testified that the point selected by the engineman for performing this work was the safest that could have been selected. (pp. 240 & 247.)

The testimony of the section laborers, of Division Engineer Geyer and Supervisor Douglas all showed that section men are instructed, [fol. 22] when employed, that train employees are not supposed to look out for them, and that they must therefore keep a lookout for themselves. They are instructed that when it becomes necessary to stop a train, the usual red flag signal must in every case be supplemented by torpedoes placed on the track, so that if the visible signal be not heeded, by reason of the engineman's attention being diverted from the track in order to perform other necessary duties about the engine, he can be warned by the explosion of torpedoes and stop the train. This shows conclusively that all section men and track employees know, and their instructions contemplate that engine employees are not constantly on the lookout and are not expected to keep a lookout for track employees, who must of necessity look out for themselves.

Under this evidence, the defendant tendered its instruction marked D-2:

"The Court instructs the jury that the employees of a railway company engaged in the maintenance and repair of a railroad track, whose business it is to keep the track in safe condition for the movement of trains, must maintain a lookout at all times for the approach of such trains and for their own safety, and the employees operating such trains have the right to assume that the track employees will keep the track free from obstructions, and consequently they owe no duty to such track employees of maintaining a lookout for them or of warning them of the approach of the train."

The law contained in this instruction is, we submit, abundantly supported by the authorities cited below.

In the case of Bennett v. A. T. and S. F. R. R. Co. (Iowa), 183 N. W., page 425, the plaintiff's intestate was a track walker who had been in the employ of the company for four or five years and was killed while in the performance of his duties by a passenger train, the crew of which did not see him. The plaintiff relied upon the failure of the defendant to give warning of the approach of its train as negligence, upon which subject the Court said:

"It is not customary nor is it obligatory to notify a track man of [fol. 23] the running of trains, and although Bennet had the right to use the track in the performance of his duties he was bound to know that a train might put in appearance at any moment and it was obligatory upon him to look out for his own safety. His duty was as clear as its performance was easy. Neither was it encumbent upon the defendant company to slacken the speed of its train when approaching the curve in question, nor does the statute or rule of the company require that a whistle be blown under such conditions. 'Trackmen are supposed to take note of the coming of trains. It is a duty enjoined upon them by law to observe and keep out of the way of moving engines and cars.'" Hoffard v. I. C. Ry. Co. (Iowa), 110 N. W. 446.

In the case of Kirkland v. Bixby (Mo.), 222 S. W. 462, the defendant was sued for damages resulting from the death of a section foreman while riding on a hand car over the tracks of the defendant company. The plaintiff's case was submitted to the jury on the sole ground that the agents in charge of the eastbound freight train were negligent in failing to sound the bell and blow the whistle at frequent intervals upon this foggy morning. This simplifies the issues for present determination.

"The rule in this state requires section men to protect themselves from passing trains. In other words, the train crew, so far as section men are concerned, have a right to expect a clear track and the humanitarian rule when violated is the only salvation for the unfortunate section man. We have written so much upon the status of the section man that we shall not attempt to reiterate but rest content with the citation of our more recent cases." Case cited.

In Land v. Railroad Co., 95 Kans. 441, it was held that a railroad company may rightfully assume that its section men while at work upon the track will look out for the approach of passenger trains at all times and that ordinarily it owes no duty to warn them of the approach of the trains save when such employees are found in places [fol. 24] of danger and it becomes apparent that they will not or cannot protect themselves. It was there held that the crossing signals were not intended for the section men working upon the track and it was also said:

"Railroads must operate their passenger trains and transport their passengers without impeding their progress or imperiling their safety by the necessity of making it a condition precedent to see if its section men employed for the purpose of keeping the track safe while trains are running over it are themselves looking out for their approach. *Train* men are employed for the very object and purpose of enabling the road to furnish such service and cannot require the employer to impair its efficiency by acting as watchman for them."

In the case of L. & N. Railroad Co. v. Hyatt's Admrx., (Ky.), 229 S. W. 101, it was held as follows:

"Section men assume the risk of injury from operating trains and must keep a lookout for their own safety. Generally speaking, those in charge of trains are under no duty to give such employees warning of the approach of trains." Blankenship's Admr. v. N. & W. Ry. Co., 143 S. W. 995.

This case was cited with approval in the case of C. N. O. & T. P. Ry. Co. v. Brown (Ky.), 234 S. W. 455, in which it was held that the plaintiff, who was a member of a fencing crew, was not entitled to lookout duty nor to warning of the approach of trains, but that he had assumed the risk and must himself keep out of the way of passing trains.

In Connelley v. Penn. Railroad Co., 201 Fed. 54, 119 C. C. A. 392, suit was brought to recover for the death of a track walker employed on the Pennsylvania Railroad on the tracks of the main line in the City of Philadelphia. In the course of a well considered opinion Buffington, Circuit Judge, said as follows:

"It is an obvious fact that many occupations, as for example a [fol. 25] powder mill operator, a structural iron worker, a blaster, a track walker, necessarily subject those who follow them to great danger. When therefore a man contracts for such employment he knows and takes on himself the risks and dangers incident to such dangerous work and his assumption of those obvious and inevitable risks is in the very nature of things part of his employment. It follows, therefore, that the employer violates no legal duty to the employee in failing to protect him from danger which cannot be escaped by anyone doing such work.

It is obvious that even where a railroad operates its trains and moves its switch drafts in a proper and careful manner, track walkers and repairmen are necessarily subjected to great risks. Their very occupation is one of constant peril. Indeed, it follows from the nature of such employment that the duty of self preservation has to rest on them, for no other adequate protection other than self-protection can be afforded them, and such has been the reasonable holding of the law. Thus in N. & W. Ry. Co. v. Gesswine, 144 Fed. 56, 75 C. C. A., it was said: 'This man was one of a number of men who were employed as section men on the railroad. They were engaged in repairing the track, taking out rails and putting in new ones, taking out cross ties and putting in new ones, and were working on

the railroad track while the trains were being operated in the usual way, manifestly a place of danger. A railroad does not suspend the operation of its trains until the track can be put in order and the proposition to these section men was, we will run the trains and operate the road as heretofore as we ordinarily do and between trains you must do this work and look out for yourself to avoid being injured by the train, and the section men accept the employment upon these terms ,and if an accident occurs and they are hurt while the trains are being managed and operated in the usual and ordinary way they can have no just ground of complaint against the railroad. It is not the fault of the railway company.' "

[fol. 26] The Court also quoted with approval from Aerkfetz v. Humphreys, and concluded as follows:
145 U. S. 418, 36 L. Ed. 758.

"Indeed, in thus making self protection the substantial safeguard of track walkers and section men the law is reasonable and just for no other dependable safeguard can be afforded their perilous work in the practical operation of railroads. As said in Keffe v. Railway Co., 92 Iowa, 182, 'These rules are founded upon the necessities of the business of operating railways.' This rule has the unanimous support of courts in all sections of the country," citing cases from Massachusetts, New Hampshire, Texas, Michigan, and Maryland.

In the case of Davis v. P. & R. R. R. Co. (Penn.), 276 Fed. 187, a track walker was killed on the main line of the defendant company while proceeding eastwardly and after he had been in plain view of those in charge of the train for a distance of 2,200 feet had they looked and observed. In deciding against the liability of the railway company Witmer, District Judge, said in part as follows:

"The evidence is clear and plainly discloses that there was nothing unusual in the operation of the train that injured Davis. There was no violation of a statutory requirement nor was there failure of compliance with any order or recognized cutsom or rule adopted for the safety and protection of employees, but in the absence of evidence showing that those in charge of the engine were aware of Davis's presence on the track where he was injured, or having discovered him recklessly ran him down, they should not be held guilty of negligence. To hold to the contrary would indeed unreasonably burden those charged with the grave and responsible duty of operating the instruments of conveyance by rail. It would shift the entire responsibility of caring for the safety of those employed upon the track and place it upon the shoulders of those having to do with the operation of the engine and train involving attention to signals of every degree of importance and entirely relieve those who have nothing but their own safety at stake."

[fol. 27] The Court quotes at length from the opinion in Connelley v. Penn. R. R. Co., above quoted.

The case of Southern Ry. Co. v. Tyree, 114 Va. 318, relied upon by the plaintiff, is not in any way inconsistent with the holding in these cases, nor does it impose upon the crew of a main line train, while running over the main line, the duty of keeping a lookout for track employees. In that case, the plaintiff's intestate was the call boy at Monroe yard, his duty being to call the crews of expected trains and summon them for service. On the night in question he had to go across the track for this purpose, pursuing the usual route taken by the employees and the public generally, with the knowledge and acquiescence of the company. In returning he was struck by a through passenger train, running down grade, with the steam shut off and without lights. Defense was made that by reason of the fact that the accident occurred in the railroad yard the company was under no obligation to ring the bell or sound the whistle, such being the holding in Pittard v. Southern Ry. Co., 107 Va., 1. The Court held that this case did not govern the case before it, the distinguishing features being that the train inflicting the injury was a main line train, running on schedule time over the main line, as distinguished from a shifting engine.

This case, while laying down the duty which the crew of a main line train owes to those upon the yard which it enters, is distinguishable from the case at bar. Tyree, at the time of his injury, was crossing the track by the usual route taken by the public generally. He was not one of the class of track employees whose duty it was to anticipate and prepare for the approach of trains. His duties took him upon the yard no longer than was necessary for him to cross the tracks. The section man must perforce spend all his time there. Tyree was killed at night, where even if he had looked he would have seen nothing, nor could he doubtless have heard in the ceaseless activity of the yard. The plaintiff's intestate was killed in broad daylight, where a turn of the head would have disclosed the presence of the engine. The Tyree case cannot therefore be deemed to have decided more than this: That a main line train entering a yard owes to persons crossing the track with the knowledge and acquiescence of the railway company, the duty owing to all other licensees at that [fol. 28] point, of warning them of the approach of the train. Any statement in the case relative to the duty of the crew of a main line train, while operated on the main line, to give warning signals to track employees is mere dictum, and not involved in the decision of the issues before the Court.

The Court erred in refusing defendant's instruction D-3.

This instruction is as follows:

"The Court instructs the jury that in order to recover in this action, the plaintiff must show by affirmative proof that the death of her intestate, S. J. Nixon, was caused by negligence of the defendant, and that such negligence cannot be inferred from the accident itself, nor from the fact taken by itself that the engine crew did not see him on the track ahead of the engine."

The statement of law in this instruction was not contained in any other instruction given by the trial court. The party who affirms negligence must establish it by affirmative evidence, which must show more than a probability of a negligent act. "This is a rule which ought never to be lost sight of." Southern Ry. Co. v. Hall, 102 Va., 137-8. "It is not safe to say," said this Court in Hall's case, supra, "because the deceased was found lying by the side of the railroad track, killed evidently as the result of collision with a train, that it was due to negligence of the employees of the railroad. It may have been entirely the result of his own negligence." 102 Va., 138.

As we have already pointed out, the question of negligence is purely a matter of conjecture, based upon the fact that the deceased was found lying by the side of the railroad track, killed as the result, presumably, of collision with a train. Theories might be suggested in explanation of the accident, but "in such cases we are not permitted to indulge in conjectures and speculation." Hall's case, supra, page 138. See also Davis v. Souder, supra.

In the light of the uncontradicted evidence that the deceased was found dead beside the track, and that the crew of the engine that was supposed to have struck him did not see him on the track, the defendant, we submit, was clearly entitled to the instruction as offered. [fol. 29] The Court erred in refusing defendant's instruction D-4.

In support of its defense that the deceased in his status of an employee, had assumed the risk of trains being operated at any time in either direction without a lookout being maintained for track employees, the defendant tendered its instruction D-4, as follows:

"The Court instructs the jury that an employee of a railroad company in accepting employment as a section foreman thereon, assumes all the ordinary risks that are necessarily and normally incident to the occupation in which he engages, whether the employee is actually aware of such risks or not. And if the jury believe from the evidence that the railway company customarily ran its trains over its tracks at or near the point of the accident in question at any time in either direction, and without maintaining a lookout for track men at such times as the engineer and fireman were engaged in the performance of necessary duties about the engine, then they are instructed that the plaintiff's intestate likewise assume the risk of danger from such cause, and the plaintiff cannot recover in this action."

As shown above the defendant proved by its witnesses that track men are universally warned of the danger and risk arising from the operation of trains in either direction at any time, and of their obligation and duty to keep the track free from obstructions for the uninterrupted passage of trains. They are likewise instructed that the engineman does not maintain a constant lookout ahead; that when necessary to signal a train to stop they must act on the assumption that the engineer is not looking out and give the signal by

torpedoes in addition to the red flag; and that it is incumbent upon them always to keep a lookout for their own safety and by constant vigilance avoid being struck and injured.

The Supreme Court of the United States, in speaking of the Federal Employers Liability Act, held in the case of S. A. L. Ry. Co. v. Horton, 233 U. S. 492, that except as to violations of Federal Statutes enacted for the safety of employees, the defense of assumption of risk is a complete bar to the action:

[fol. 30] "It seems to us that Section 4 in eliminating the defenses of assumption of risk in the cases indicated (violation of Safety Appliance Act) quite plainly evidenced the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action."

The Court further held that under the common law doctrine of assumption of risk the employee assumed defects due to the master's negligence when these defects and risks arising therefrom were known to him or were open and obvious and plainly observable. Roberts Federal Liability, Sec. 554.

Even though the risk which the defendant contends that the plaintiff's intestate assumed in this case might be said to have arisen from negligence (if the Court take a different view of the question of the duty of lookout), nevertheless, it is still a risk which the deceased assumed. This doctrine was recognized by this Court in the case of Morris & Co. v. Alvis, 130 Va. 434.

"An employee may be free from negligence in the particular circumstances of an accident, and still barred from recovering damages for injury resulting therefrom, because he assumed the risk, and this may be true, even though the accident was due to an unsafe place or an unsafe appliance furnished by the master. Indeed, there is never any occasion for the application of the doctrine of assumed risk unless there has been some question of original negligence on the part of the master. If the master has been free from negligence in toto and ab initio, there is no liability, and the question of assumed risk (and of contributory negligence as well) does not arise."

The weight of authority supports the proposition that an employee of a railway engaged in the maintenance of its tracks assumes the risk of trains being operated without a lookout being maintained for him.

In Davis v. P. & R. R. R. Co., 276 Fed. 187, the plaintiff's intestate, Davis, was a track walker on the line of the defendant company and was killed by one of its trains. The evidence disclosed that there was nothing unusual in the operation of the train that in-[fol. 31] jured him and the Court held that in the absence of evidence showing that those in charge of the engine were aware of his presence on the track where he was injured or having discovered him recklessly ran him down, they should not be guilty of negligence. In the course of its opinion the Court further said:

"To hold the contrary would indeed unreasonably burden those charged with the grave and responsible duty of operating the instruments of conveyance by rail. It would remove the entire responsibility of caring for the safety of those employed upon the track and place it upon the shoulders of those having to do with the operation of the engine and train, involving attention to signals of every degree of importance and entirely release those who have nothing but their own safety at stake. Nor could it be held that, notwithstanding, the risk was assumed, since in order to constitute negligence such conduct must be regarded as unusual and consequently not assumed, though it has been held that a track walker employed to walk over, watch, and repair tracks where there is a constant passing of trains necessarily assumes the risk of being struck by trains properly or ordinarily operated."

The Judge in delivering the opinion goes into an exhaustive discussion of the authorities on this point, and the case is accordingly a very valuable authority.

In Bennett v. A. T. & S. F. Ry. Co. (Iowa, 1921), 183 N. W., 424, the plaintiff's intestate, Bennett, was an employe of the defendant company engaged as a track repairer and track walker, in which position he had been serving for four or five years and was thoroughly acquainted with the conditions and the time and direction of trains. On the day in question Bennett was not seen on the track by either the members of the crew of the train which struck him as he was in the act presumably of avoiding a passenger train going in the opposite direction.

The Court held that it was neither customary or obligatory upon the part of the defendant company to notify the track men of the running of trains and that although he had a right to use the track [fol. 32] in the performance of his duties he was bound to know that a train might put in an appearance at any moment and it was obligatory upon him to keep a lookout for his own safety. In this connection the Court said:

"Furthermore, Bennett assumed all the risks incident to his work and to the usual operation of the trains of the defendant company and also the risks of his violation and disregard of the rules of the company adopted for his own safety. * * * A defendant carrier has the federal right to a fair opportunity to show in diminution of damages and negligence attributable to the employee without specific pleading. Kansas City Ry. v. Jones, 241 U. S., 181, 60 L. Ed., 943. This must also be true as to assumption of risk. The common law rules of assumed risks are not changed by the Federal Employers' Liability Act. Jacobs v. Southern Ry. Co., 241 U. S., 229, 60 L. Ed., 970."

In Roberts Federal Liability of Carriers (1918), Sec. 558, this doctrine is treated in part as follows:

"The nature and elements of the doctrine of assumption of risk as applied to interstate employees of interstate carriers under the

Fderal Act, have been well established in a series of controlling decisions by the United States Supreme Court. The risks that may be assumed by an interstate employee are of two kinds, ordinary and extraordinary. Ordinary risks are those that are normally incident to the occupation in which an employee voluntarily engages. An employee is conclusively presumed to have knowledge of such risks and assumes injuries arising therefrom. Such ordinary risks are assumed by an employee whether he is actually aware of them or not, for the dangers and risks that are normally or necessarily incident to his occupation are presumably taken into account in fixing the rate of wages," citing C. & O. R. Co. v. Meadows, 119 Va., 33.

By refusal of the defendant's instruction D-4, the court deprived [fol. 33] the defendant entirely of the opportunity of making this defense before the jury, a defense abundantly supported by evidence and permissible under the Federal Act.

The Court erred in refusing defendant's instruction D-5.

This instruction is as follows:

"The Court instructs the jury that notwithstanding they may believe from the evidence that if the engineer had been keeping a lookout he could have seen the defendant's intestate in time to have stopped the train and avoided the accident, his failure to keep such lookout cannot be imputed to the defendant as negligence if they also believe from the evidence that the engineer, in the exercise of reasonable care on his part, was at the time engaged in the discharge of other necessary duties and therefore could not maintain such lookout."

The primary duty of the engineer was to operate the train safely, and to that end to exercise reasonable care in the performance of all the necessary duties of his position. His duty to maintain a lookout for the protection of persons on the track was of necessity suspended at such times as he was engaged, in the exercise of reasonable care, in the performance of other necessary duties. The jury would be very apt to believe that the engineer, if he had been looking out could have seen the deceased in time to avoid the accident, but his failure to keep a lookout did not in itself establish negligence; he had other duties to perform besides maintaining a lookout, and the purpose of the instruction was to call the attention, pointedly, of the jury to the fact that the failure of the engineer to maintain a lookout could not be imputed to the defendant as negligence if he was engaged at the time of the accident, and in the exercise of reasonable care, in the performance of other necessary duties—notwithstanding they might also believe that if he had been keeping a lookout (as was stressed in the argument) he could have seen the deceased in time to stop the train and avoid the accident.

This instruction embodies a sound proposition of law not covered by any other instruction and was directly responsive to the evidence, [fol. 34] and refusal of the Court to give it was, we submit, clearly prejudicial to the defendant.

In consideration of the foregoing reasons your petitioner prays

that a writ of error and supersedeas may be awarded to said judgment, and that the same may be set aside and a judgment entered in favor of the defendant, or a new trial granted, as the Court may determine.

Respectfully, The Chesapeake & Ohio Railway Company, by Harrison, Lang, & Williams, Attorneys.

The undersigned practioners in the Supreme Court of Appeals of Virginia hereby certify that in their opinion it is proper that the judgment complained of in the foregoing petition be reviewed.

Randolph Harrison, S. H. Williams.

Recd. Sept. 8, 1923. F. W. Sims.

Writ or error and supersedeas awarded. Bond $15,000.00. F. W. Sims.

To the Clerk at Staunton.

[fol. 35] In Circuit Court of Nelson County, Va., at Lovingston, Virginia, June 7-8-9, 1923

Mrs. Annie Nixon, Admr.,

v.

Chesapeake & Ohio Railway Co.

Statement of Evidence

Appearance of Counsel

Counsel for Plaintiff: Mr. Duncan Drysdale.
Counsel for Defendant: Messrs. Harrison, Long & Williams.

Mrs. Annie Nixon, Admrx.,

v.

Chesapeake & Ohio Railway Co.

The following evidence on behalf of the plaintiff and the defendant, respectively, as hereinafter noted, is all of the evidence that was introduced at the trial of this case:

Evidence introduced on behalf of plaintiff

Mrs. Annie Nixon, plaintiff sworn.

Direct examination.

By Mr. Drysdale:

Q. Mrs. Nixon, your name is Mrs. Annie A. Nixon, is it not?
A. Yes, sir.

[fol. 36] Q. Tell the jury whether or not you are the widow of Sam Joe Nixon?

A. Yes, sir, I am.

Q. Your husband is dead?

A. Yes, sir.

Q. And you have duly qualified in this court as his administratrix, have you?

A. Yes, sir.

Q. Where were you living on the 21st day of June, 1921?

A. I was living in the section house down at the old lock, about a mile and a quarter from Midway station.

Q. That was on the Chesapeake & Ohio Railway?

A. Yes, sir, where the old locks used to be.

Q. Your husband was then living?

A. Yes, sir.

Q. What was his occupation?

A. He was a section foreman for the Chesapeake & Ohio Railway Company.

Q. How long had he been section foreman?

A. About ten years.

Q. Continuously back from that time?

A. Yes, sir.

Q. How long had you and Mr. Nixon been married?

A. You mean at the time of his death?

Q. Yes?

A. Six years.

Q. How many children did you have?

A. Four.

Q. Before I forget it, let me ask you how long had he been section foreman?

A. About ten years.

Q. Continuously?

A. Yes, sir.

Q. Now, what were the respective ages of the children, give the youngest and the oldest?

A. The youngest was nine months old and the oldest was five years old.

Q. It is alleged in the pleadings in this case that your husband was killed by a train on the morning of the 21st of June. Just tell the jury as shortly as you can, what you know of the killing of your husband? Tell what you did the first thing that morning or at the time your husband left the house?

A. After he got his dinner bucket off the table I went with him [fol. 37] to the track and started back, I went behind him to the track, and just as he got on his velocipede he kissed me good-bye and stopped to look and listen both ways up and down the track to see if there was a train coming and after he put his velocipede on the track I turned to come back to the house, which is only a few steps, and just as I got on the porch a train came around and the wind was blowing strong, there was an awful strong wind that morning, and when I saw the train I turned and looked up the

track and I saw my husband, but of course I couldn't make any signal to him because the wind was blowing so strong and the train was opposite the house and by that time I saw the engineer and fireman both standing in the—I don't know what you call it, but the deck I suppose, together, talking and laughing together. I didn't make any signal because I was so unnerved and I saw my husband when they threw him off the track over on the bank, I saw him going over on the bank.

Q. You say you saw the train coming around—I don't know whether the jury will quite understand that, from what direction did the train come, from your left or your right? When you were standing facing the railroad as you say, and saw the train come around, come around what?

A. When the train came into sight.

Q. What had it come around?

A. It came around the bluff.

Q. That is what I want you to tell this jury, you know that, but they do not. You say the train was coming around the bluff?

A. The train had to come around the bluff before I could see it, of course.

Q. Now these gentlemen don't know about that and I want you to tell them. Now how far is this bluff from where you were standing?

A. I don't know exactly, but it was as far as from here to—the bluff you mean?

Q. From where you were standing how far was the train away when you could see it after it came around the bluff and into your sight?

A. Before I could see it?

Q. Yes.

A. About two or three rail lengths, or about as far as from here to that window over there.

Q. I am not speaking about your seeing the men, but I am speaking about the train?

A. About as far as from here to the brick building over there.

[fol. 38] Q. The bluff was?

A. Yes, sir.

Q. If you were going to walk from your house along the railroad track to the bluff, how long would it take you?

A. About ten or fifteen minutes.

Q. Then that would be farther than from here to that building, wouldn't it?

A. Yes, I think so.

Q. Now you say you saw the train coming around the bluff, you had not heard it before that, had you?

A. No, sir.

Q. And your husband by this time was some distance down in the opposite direction going towards Gladstone?

A. Yes, sir.

Q. Now you say when they passed you saw the men standing on the deck of the engine?

A. Yes, sir.

Q. And neither one was keeping a lookout?

A. No, sir.

Q. Did you see the train overtakre your husband and kill him?

A. Yes, sir, I did.

Q. You have told the jury you saw him thrown to the right?

A. Yes, sir, I saw him thrown over the bank.

Q. This velocipede or tricycle, could you give the jury some description of it. Was your husband sitting in the middle when he was operating the tricycle, was he sitting between the two rails, or was he sitting over on one rail?

A. He was sitting over the right rail.

So that the cow-catcher in striking him would throw him to the right?

A. Yes, sir.

Q. When did you have any communication with anyone else as to your husband being killed; who told you of it first or how did you know it?

A. The colored men came down and told it.

Q. Who were the colored men?

A. Tarleton Fleming, he was the one that told me and the others stayed on the car.

Q. The others stayed on the car?

A. Yes, sir, he got off the car and told me.

Q. Were these men that used to work under Mr. Nixon?

A. Yes, sir.

[fol. 39] Q. At this time the train had passed, of course, for some considerable time?

A. Yes, sir.

Q. And these men got this car and came up to your house?

A. Yes, sir.

Q. Where were you when the men came up?

A. I was out in the yard.

Q. You knew at that time, did you, that he was dead?

A. Yes, sir, I knew he was dead.

Q. You say there was a hard wind blowing?

A. Yes, sir.

Q. In what direction was it blowing? Was it blowing facing Mr. Nixon or the other way?

A. Facing Mr. Nixon.

Q. Have you any idea how fast that train was travelling?

A. It seemed to me like about 30 or 40, or 40 or 50 miles an hour.

Q. It was travelling fast, you think?

A. Yes, sir.

Q. You did not see your husband's body on the track, I presume?

A. No, sir.

Q. Was his body brought home?

A. Yes, sir.

Q. Do you know anything with respect to your husband's duties, whether it was his business to look after the track all the time, not only during working hours but all the time?

A. Yes, sir, it was his duty.

Q. Did he ever go out at odd times, out of his working hours, to look after the track?

A. Yes, sir.

Q. His working hours were from seven to four, with an hour off for dinner, I suppose?

A. Yes, sir.

Q. How old was your husband at the time of his death?

A. 32.

Q. Was he a strong man or weakly man?

A. He was a strong healthy man.

Q. What did he earn at that time?

A. He earned, as well as I can remember, $133.66 a month.

Q. How much of that did he spend on his family?

A. He spent most all of it.

[fol. 40] Q. He spent most all of it?

A. Yes, sir.

Q. You and your four children were entirely dependent upon him for a living, were you not?

A. Yes, sir.

Q. You had no other means?

A. No, sir.

Q. And he had no other means?

A. No, sir.

Q. And you say he spent most of it on his family?

A. He spent it all on his family.

Q. He spent it all on his family?

A. Yes, sir, it took it all.

Q. Do you know anything about this tricycle or velocipede having been furnished for his use, by the company?

A. Yes, sir, they gave him permission to go from and to his work, on it.

Q. And that was his daily habit, was it not?

A. Yes, sir.

Q. He went away on it every morning?

A. Yes, sir.

Q. And came back every night?

A. Yes, sir.

Q. I think you have already said that he was a section foreman?

A. Yes, sir.

Q. Do you know how long he had been a foreman?

A. About 10 years.

Q. How long had he worked for the company altogether?

A. I don't know about that.

Q. Do you know how long he had been working for the company; he worked first of all as an ordinary section hand, I suppose?

A. Yes, sir.

Q. That is the habit, but I didn't know about it.

A. Yes, sir.

Cross-examination.

By Mr. Long:

Q. Where do you live?
A. You mean at the time of his death?
Q. No, where do you live now?
[fol. 41] A. Glasgow.
Q. How long have you been living there?
A. It will be two years this month.
Q. Did you go there to live immediately after your husband's death?
A. Yes, sir.
Q. With whom do you live?
A. My father.
Q. Was it your habit, Mrs. Nixon, when your husband started out to work in the morning to always go with him down to the track?
A. Yes, sir, I never missed a morning.
Q. And it was his habit always when he put his tricycle on the track or before he put in on to look both ways to see whether a train was coming?
A. Yes, sir.
Q. And what he did that morning was the same thing he had been doing before?
A. Yes, sir.
Q. When he got started what did he do?
A. After he left home?
Q. After he started on his tricycle to go to his work?
A. I turned around and went back to the porch.
Q. Did you have anyone with you at all?
A. I had the baby.
Q. You carried the baby in your arms?
A. Yes, sir.
Q. And you went to the porch after he left?
A. Yes, sir.
Q. Your house was situated immediataely beyond the lock, wasn't it?
A. No, it was right at the lock.
Q. Wasn't the lock between your house and the track?
A. Yes, sir.
Q. All that was left of the old lock?
A. Yes, sir.
Q. Was there any gang-way across it or bridge across the lock?
A. No, sir.
Q. You had to go around the lock to get to your house or porch?
A. Yes, sir.
[fol. 42] Q. And it took you only a little while, I presume?
A. Yes, sir, it was just a few steps.
Q. Some 65 steps?
A. No, sir.
Q. How far was it?

A. About a second's walk.
Q. You think you could get there in about a second?
A. I know I did.
Q. I think Mr. Drysdale in his opening statement said it was about 30 steps. Is that about right?

By Mr. Drysdale: I think I have a witness who stepped it and I think it is 29, if my memory serves me correctly.

By Mr. Long:

Q. You made your 29 steps then in about a second?
A. Yes, sir.
Q. And you had gone up on the porch?
A. I had to go up the steps.
Q. How many steps?
A. I think it is between 6 and 7.
Q. When you got up on the porch what did you do?
A. I saw a train coming and I looked back to see if I could see my husband, to see if he noticed the train.
Q. Now, what attracted your attention to the train?
A. I saw the train coming at such a speed and my habit was always to look out when I heard a train to look and see if he was there.
Q. I don't think I fully caught your answer, what attracted your attention to the train?
A. The way it was speeding.
Q. The speed of the train attracted your attention to it?
A. Yes, sir.
Q. It was coming around the bluff so fast?
A. Yes, sir.
Q. How do you know it was going fast?
A. I could see it.
Q. How could the speed of the train attract your attention, is all I want to know, did it make a noise?
A. No, it didn't make any noise.
Q. Then how did the speed of the train make itself known to you so as to attract your attention?
[fol. 43] A. Well, I saw it when I walked up on the porch, I couldn't help but see the train after it was right there.
Q. Then you did not look at the train because it was going so fast.
A. Yes, sir.
Q. Is that the reason you looked at it?
A. No, sir, I saw it going so fast and that is the reason it took my attention, and I knew my husband was on the track.
Q. You saw the train merely because you looked up that way. Isn't that true?
A. Yes, sir.
Q. It happened to come within your line of vision, and you say you saw the train?
A. Yes, sir.
Q. And as soon as you saw it you realized it was going very fast, didn't you?

A. Yes, sir.
Q. Just as soon as you saw it?
A. Yes, sir.
Q. What part of the train did you see first?
A. I saw the engine, the front of the train.
Q. The head of the engine?
A. Yes, sir.
Q. You could see the cab, could you?
A. Not when I first saw the train.
Q. The engine came almost directly towards you, didn't it?
A. Yes, sir.
Q. And you stated a while ago about how far you thought it was, or attempted to state it by the time it would take you to walk up there and it was such a distance that it would take you about 10 minutes to walk to where you first saw it?
A. Where I first saw the engine coming?
Q. Yes?
A. Yes, sir.
Q. It was 10 minutes east of you?
A. Yes, sir.
Q. Coming down towards you, directly towards you?
A. Yes, sir.
Q. And you at once noticed that it was coming with extra-ordinary rapidity?
A. Yes, sir.
Q. How long did it take to get to you?
[fol. 44] A. I don't know, but just almost in the snap of your finger.
Q. In the snap of your finger this train was right at you?
A. Yes, sir.
Q. How long did it take *you* to pass you?
A. I don't know, but it just snapped right by.
Q. It was like a flash, wasn't it?
A. It was almost like a flash.
Q. It went by you almost like a flash?
A. Yes, sir.
Q. And you claim to have seen the engineer and fireman on the cab of that engine as it passed by you like a flash?
A. Yes, sir.
Q. When did you first see them?
A. When they got almost to the house.
Q. Immediately opposite you?
A. Yes, sir.

By Mr. Drysdale: She said almost to the house, not immediately opposite.

A. I said almost to the house.

By Mr. Long:

Q. When did you stop seeing them; how far had they gone before it got out of your sight?

A. About as far as from here to those bannisters.
Q. It was about the distance between where you are sitting and those bannisters, during which you could see them?
A. Yes, sir.
Q. That distance is about 20 feet, isn't it?
(No answer.)
Q. Isn't it about 20 feet, don't you think?
A. I don't know.

By Mr. Long: Just to get it in the record, would that be a fair estimated, Mr. Drysdale?
By Mr. Drysdale: Yes, I think it would.

By Mr. Long:

Q. So then for a distance of about 20 feet these men were within [fol. 45] your line of vision, so that you could see them. That is right, isn't it?
A. Yes, sir.
Q. And the train was going very fast and it passed by almost like a flash. Is that right?
A. Yes, sir.
Q. And what did you think the men were doing?
A. They were standing there talking to each other and laughing.
Q. They were laughing and talking and you say that you saw that as they passed by like a flash?
A. Yes, sir.
Q. Were they sitting on their seats or standing?
A. No, sir, they were standing.
Q. Where abouts were they standing?
A. About the middle of the deck, I suppose that is what you call it.
Q. What do you call the deck of the engine?
A. Between the engine and the tender, I suppose, I don't know.
Q. You mean that little open space between the engine and the tender?
A. Yes, sir.
Q. You call that the deck?
A. Yes, sir.
Q. That is the floor of the cab, isn't it, extended?
A. I don't know, but that is where they were at.
Q. You think they were standing back there, both of them?
A. I know they were, I saw them.
Q. You saw them as they flashed by you?
A. Yes, sir.
Q. And you saw in that instance of time that they were laughing and talking to one another?
A. Yes, sir.
Q. Did they seem to be in a good humor?
A. I suppose so, they were laughing.
Q. You couldn't hear them, could you?
A. No, sir, I didn't hear them, but I saw them.

Q. Now all that you have stated happened almost instantaneously, you said the train came down upon you like the snap of your finger and then the train passed by you like a flash. Now when did you look at your husband to see where he was?

A. When I first saw the train.

Q. Just as soon as you saw the train?

A. Yes, sir.

[fol. 46] Q. Were you still looking at him when the train came by?

A. No, sir, when the train came by I looked at the train to see if I could see the engineer and fireman and just as I looked at them I looked back to see if my husband was off the track.

Q. Mrs. Nixon, where was your husband when you looked to see about him?

A. He was on the track.

Q. How far from you?

A. About as far as from here——

Q. Was he as far as the bluff around which the train came?

By Mr. Drysdale: The bluff was in the opposite direction.

By Mr. Long:

Q. You said you saw the engine coming around that bluff. Now was he as far to the west as the bluff was to the east, or had he gotten to the little farm bridge up there?

A. Yes, sir.

Q. He had gotten up there?

A. Yes, sir, he had passed the farm bridge.

Q. When you saw him?

A. Yes, sir.

Q. And that was while the engine was still approaching you, you looked up there and saw him pass the farm bridge?

A. Yes, sir, I did.

Q. And he had gotten that distance while you were walking up from the track to the porch?

A. Yes, sir.

Q. Did you see your husband look back at all?

A. Yes, sir, he looked back before the train came around the bluff.

Q. When did you see him look back?

A. Before I got to the porch.

Q. You stopped and looked up the track to see him then before you got to the porch?

A. No, sir, I didn't stop, I just turned my head but I kept on walking, I didn't stop.

Q. You kept on walking and turned your head so as to see him going westward from you over the track?

[fol. 47] A. Yes, sir.

Q. And he looked back, did he?

A. Yes, sir.

Q. How many times?

A. I saw him once.
Q. You didn't see him look back but once?
A. No, sir.
Q. What made him look back?
A. I suppose he wanted to see if a train was coming.
Q. It was his habit to look back to see if a train was coming?
A. Yes, sir.
Q. I suppose he understood or knew that he was in constant danger of trains coming?
A. Yes, sir.
Q. You understood that too?
A. Yes, sir.
Q. That was a part of the risk of his business, wasn't it?

By Mr. Drysdale: I object to that question. That is an argument. She does not know what her husband's opinion was.
By Mr. Long: She said she knew it.
By Mr. Drysdale: That is simply an argument.

By Mr. Long:

Q. You assumed that he was looking to see if a train was coming?
A. I suppose he was.
A. At the point where he was could he have seen the same train you saw?
A. No, sir.
Q. Why couldn't he?
A. It hadn't come around the bluff.
Q. You say you did not see the train until it came around the bluff, did you?
A. No, sir, and he looked back before the train came around the bluff.
Q. If he had looked around after the train came around the bluff or at the same time you looked around, could he have seen it from where he was?
[fol. 48] A. I don't know.
Q. Don't you know that there is a curve in the track just west of you and if he had looked back he wouldn't have seen the engine; don't you know that?
A. No, sir.
Q. You live there, or did live at that place, didn't you?
A. Yes, sir.
Q. You know the way the track is located and the curves in the track and the obstructions along the right of way, you knew all about those things, didn't you?
(No answer.)
Q. If he had looked back from where you saw him after the train had passed your house, he would have seen it, wouldn't he?
(No answer.)
Q. Wouldn't he have seen it?
A. I don't know.

Q. Don't you think he would have seen it from the configuration of the track at that point?

(No answer.)

Q. Do you think the engineer could have seen him?

A. Yes, sir, the engineer could have seen him after he got on the straight line.

Q. He could have seen the engine too, couldn't he?

A. I suppose he could.

Q. One could see just as well as the other, couldn't they?

A. Yes, sir, but the wind was blowing so he couldn't hear the train.

Q. Now didn't you state on the former trial of this case that you saw your husband look back two or three times after you had seen the train?

(No answer.)

Q. Didn't you say that?

A. Yes, I guess I did.

Q. Now you think he did not look back at all after you saw the train?

A. Yes, sir, he did—no—you mean after I saw the train?

Q. Yes? Did he look back at all after you saw the train?

A. I don't know.

Q. You say he looked back once, you remember his looking back once. Wasn't that after you saw the train?

A. No, sir, that was before I saw the train.

Q. You didn't see him then at all look back after you got on the porch, did you?

[fol. 49] A. No, sir.

Q. On the former trial you thought he looked back two or three times after you saw the train, didn't you?

A. I don't remember.

Q. When the train got on that straight track to the west of you, could you see the track in front of the train?

A. No, sir.

Q. Why not?

A. The engine cut it off.

Q. The engine and the train cut your view off, didn't they?

A. Yes, sir.

Q. Wasn't your situation such as the train went along in front of you, you could see the side of the train towards the river?

A. Yes, sir.

Q. But you couldn't see the side of the train on the bank side, on the north side, could you?

A. I don't know, I never noticed it.

Q. You could see the train on the side next to the river, just the side of the train, as well as the rear end of the train, couldn't you?

(No answer.)

Q. Wasn't it such that you could see along the river side of the train, as well as the rear end of the train?

A. Yes, sir.

Q. That is true, isn't it?

A. Yes, sir.

Q. You might possibly have seen the engine up ahead of you on the river side?

A. I don't know, I never noticed it after it passed.

Q. As soon as the train got on that track didn't it intercept your view of the track west of the train, so that you couldn't see that track at all?

(No answer.)

Q. Isn't that a fact?

A. I don't understand you.

Q. I understood you to say a while ago that when the train got on the straight track you couldn't see the track in front of the train because the train was in the way. That is true, isn't it?

A. Yes, sir.

Q. When the train got on the straight track you could see your husband ahead of the train?

A. I seen the train when the train hit him, I seen him when the train hit him, when it knocked him over, I seen him when he fell over.

[fol. 50] Q. You could see him?

A. I couldn't see him when the train hit the car.

Q. You could not see him on the track when the train got on the straight track?

A. No, sir.

Q. As soon as it got on the straight track it hid him from your view?

A. Yes, sir.

Q. And you think now you saw him thrown from the track?

A. Yes, sir, I know I did, with my own eyes.

Q. You knew he had been struck and probably killed, didn't you?

A. Yes, sir.

Q. Do you know what time that happened?

A. About 6:30, or 25 minutes to seven, that is the time his watch stopped on him, 25 minutes to seven.

Q. What time did he leave your house?

A. About 6:30.

Q. And you think you saw him struck off the track five minutes later?

A. I know I saw him.

Q. And you were satisfied that he was killed?

A. Yes, sir.

Q. You were still standing on the porch?

A. Yes, sir.

Q. What did you do?

A. I fell to the floor.

Q. How long did you remain on the floor?

A. I don't know.

Q. Did you have your baby in your arms?

A. I did.

Q. What became of the baby?

A. He laid there until I became conscious and picked him up.

Q. You don't know how long it was before you became conscious?

A. No, sir, I don't.

Q. Was anybody in the house with you?

A. Yes, sir, there was a little colored girl in the kitchen.

Q. Did she come to your assistance?

A. After I got up—no, sir, she didn't come to me while I was laying on the floor.

[fol. 51] Q. Wasn't she out on the porch with you?

A. No, sir, she was in the kitchen door.

Q. Didn't you state on the former trial of this case that that girl came out on the front porch and was on the front porch with you and saw your husband struck from the track?

A. No, sir.

Q. And that she turned her back in order not to see it?

A. She was standing at the door, she wasn't on the porch. She was standing in the door and when she saw my husband struck she went back in the house and left me alone. That is what she said.

Q. Where was the kitchen door?

A. It was kinda on the side next to the bluff.

Q. That was on the east side of the house, wasn't it?

A. I don't know what side it was on.

Q. Wasn't it on the side opposite the bluff where you first saw the train?

A. Yes, sir.

Q. And you claim that the girl was standing at that door on the east side of the house and saw your husband?

A. No, sir, you misunderstood me, she was in the front door when the engine hit my husband and when she seen the engine hit my husband she turned her back and went to the kitchen door and left me there.

Q. How do you know that?

A. That is her statement, that is what she told me afterwards. I asked her why she didn't come to me and that is all she told me.

Q. Then there was somebody at the door to the porch besides yourself, this girl was there, wasn't she?

A. Yes, sir, she was at the door.

Q. Where is she?

A. I don't know where she is.

Q. Is she here now?

A. I don't think she is.

Q. She was a witness at the former trial, wasn't she?

A. Yes, sir.

Q. And you don't know where she is now?

A. No, sir, I don't.

By Mr. Drysdale: At the proper time I want to show that I made efforts to get that witness. I had forgotten about that.

[fol. 52] By Mr. Long: You can do that at any time. There is no use in interrupting the examination now to do that.

By the Court: No, go ahead Mr. Long.

By Mr. Long:

Q. You think the colored girl was at the door when you fell in a daze?

A. That is what she said.

Q. Any way she did not come to your assistance?

A. No, sir, she didn't.

Q. After you recovered from your faint what did you do?

A. I went in and laid down on the bed.

Q. How long did you stay there?

A. I guess about five or six minutes or something like that. I did not time myself but I guess that was about the time.

Q. How long was it before these colored men came up there on the hand car and told you about Mr. Nixon's death?

A. I don't know what time it was.

Q. Wasn't it about an hour after it occurred?

A. I didn't think that it was that late.

Q. And had you made any effort in the meantime at all to get anybody to come to your assistance?

A. No, sir. I wasn't able to do so.

Q. Why didn't you send that girl to call in a neighbor?

A. Because I didn't think about it. I was so unnerved and excited.

Q. Didn't you think it worth while to send up to where you saw your husband hit to find out whether he was killed?

A. I suppose I would have done so if I had been conscious of it but I wasn't conscious of it.

Q. At any rate you didn't make any effort at all?

A. I wasn't able to make any effort.

Q. When these colored men came up, where were you?

A. I was out in the yard.

Q. What were you doing out there?

A. I walked out in the yard, I had just gone in the yard. I had just gone down the steps when they came up and was standing in the yard.

Q. And where was your little servant girl, at that time?

A. I think she was in the house somewhere.

Q. Do you know of any reason why you should not have sent [fol. 53] her to a neighbor to get assistance of some neighbor.

A. I wasn't able.

Q. Couldn't you have told her to go and see a neighbor?

(No answer.)

Q. Isn't it a fact, Mrs. Nixon, that you did not know about your husband's death until you were told by these section men?

A. No, sir, I knew he was dead.

Q. Isn't it a fact that just as soon as you heard it from one of the section men, that your husband had been killed, you asked one of these men to go and call Mrs. West, a neighbor?

A. Yes, sir.

Q. That is the first thing you did, wasn't it?

A. Yes, sir.

Q. And asked her to come there and be of assistance to you?
A. Yes, sir.

Q. Now you have just stated that you were out in the yard when the section men came up and one of them told you of your husband's death. Didn't you state at the former trial that you were in your house and on your bed when one of these men came in and told you about your husband's death?

A. No, sir.

Q. You did not?

A. No, sir.

Q. Now let me refresh your memory by reading from page 33 of the transcript of testimony taken at the last trial, during your cross-examination by Mr. Harrison:

"Q. You say one of the section men came down to the house."
"A. Yes, sir.
"Q. Did he tell you that Mr. Nixon had been killed?
"A. Yes, sir, he told me.
"Q. Where were you when he told you?
"A. On the bed."

Now you think that is an erroneous transcript of what you said; or are you now correcting the statement that you made then? Which statement, in other words is true?

A. This statement.

Q. The one you last made?

A. Yes, sir.

Q. They told you out in the open, in front of the house?

[fol. 54] A. Yes, sir.

Q. And it is not true then that one of the section men came into the house and told you of Mr. Nixon's death while you were in the house and on the bed?

A. No, sir.

Q. Your former statement then is not true?

(No answer.)

Q. Is that so?

A. Yes, sir.

Q. It is not true?

A. No, sir.

Q. And you don't know why this colored girl did not help you, do you?

A. No, sir.

Q. And you never asked her why?

A. No, sir.

Q. Now in reference to the cow which has been referred to, who milked that cow?

A. I did.

Q. Did Mr. Nixon ever milk it?

A. He tried to milk her but he couldn't finish milking her.

Q. Why not?

A. Because his hands would cramp on him and wouldn't let him.

Q. So you did it habitually then?
A. Yes, sir.
Q. You milked that cow morning and night?
A. Yes, sir, when she was milked.
Q. And where was the cow kept?
A. In Mr. Dunn's pasture.
Q. Up there near Midway?
A. Yes, sir.
Q. And right by the tool house, wasn't it?
A. Right up from the tool house, it wasn't right at the tool house, it was right up on the hill from the tool house.
Q. And that was about a mile, wasn't it, from where you lived?
A. Yes, sir.
Q. And you say you went back and forth morning and evening and milked that cow there because Mr. Nixon couldn't do it?
A. I do.
Q. How did you get back and forth?
A. I walked.
Q. Along the track?
[fol. 55] A. Yes, sir, on the right of way.
Q. And the cow was down at the section house and you milked the cow down there?
A. Yes, sir, I did.
Q. During what period of the year was the cow kept up at the Dunn pasture?
A. In the summer months.
Q. At the time of the accident was the cow kept up there?
A. Yes, sir, but she wasn't milked.
Q. She wasn't milked?
A. No, sir, we wasn't milking at the time of the accident because the cow was fresh on Sunday and Mr. Nixon was killed on Tuesday.
Q. You say the cow was fresh on Sunday before Mr. Nixon was killed on Tuesday?
A. Yes, sir, and we never milked the cow after she was fresh, we let the calf use all the milk.
Q. You say the cow was not being milked at all at that time?
A. No, sir, she was not.
Q. Who fed the cow?
A. I did.
Q. Mr. Nixon could have fed the cow, couldn't he?
A. I suppose he could.
Q. There was no reason for your going up there to feed the cow, was there?
A. I fed the cow and I milked her. We always gave her chop to hold still when we milked her and that is all we fed her was chop in the summer time.
Q. Did Mr. Nixon take any bran bucket with him when he went away that morning?
A. No, sir.

Q. What buckets if any, did he have with him?
A. He had his dinner bucket.
Q. Nothing but his dinner bucket?
A. No, sir.
Q. Did you ever go up to the scene of the accident after the accident occurred, did you go up to where it had occurred?
A After a good while I did.
Q. You didn't go up that day?
A. No, sir.
Q. And at this time you say you did not have to go there to look after that cow?
[fol. 56] A. I went up about once a week to see if her bag was all right.
Q. Then there was no reason for you or Mr. Nixon to take any particular care of the cow at that time?
A. No, sir.
Q. What became of the cow?
A. I sold the cow; you mean after he died?
Q. No, what became of the cow after Mr. Nixon's death?
A. I sold it.
Q. Who did you sell it to?
A. To Mrs. Turner.
Q. And you say all the milk the cow had after she became fresh was given to the calf?
A. Yes, sir.
Q. Did you sell the calf also?
A. Yes, sir.
Q. To Mrs. Turner?
A. Yes, sir.
Q. How long did you remain at this point, near Midway, after your husband's death, you left very soon after his death, didn't you?
A. Yes, sir, we went to the burying and came back and moved that same week.
Q. Mr. Nixon's body was taken to your father's home and buried at Glasgow and the same week you came back and moved up to Glasgow and you have lived there ever since?
A. Yes, sir.

By Mr. Drysdale:

Q. I think you told the jury that the cow had a calf on Sunday.
A. Yes, sir.
Q. And Mr. Nixon was killed on Tuesday.
A. Yes, sir.
Q. How long before the date of Mr. Nixon's death had you ceased to milk her, in other words, how long did she go dry before the calf was born?
A. About two months.
Q. Then you did not milk her and she wasn't milked at all for about two months before Mr. Nixon was killed?
A. No, sir.

Q. Now Mr. Long brought to your attention the fact that at the last trial you said that the colored men came up and told you of your [fol. 57] husband's death and that you were in bed, and you say now you were in the yard, and you answered him that the former statement was not true. Do you mean by that, that it was wilfully untrue or simply that you had made a mistake?

A. I had made a mistake.

Q. Have you at any time, either at the former trial or at this trial stated anything that was consciously untrue?

A. No, sir, I have not.

Q. If you have made any statement that is not true it was done by mistake and not wilful?

A. Yes, sir.

By Mr. Long:

Q. Mrs. Nixon, you said a while ago, in answer to a question asked you by Mr. Drysdale that you have not wilfully made any misstatement in your testimony either at this trial or at the former trial. That is true, isn't it?

A. I said if I had made any it was just by mistake.

Q. An unintentional mistake?

A. Yes, sir.

Q. But you did make some statements that were not correct, didn't you?

By Mr. Drysdale: I think her attention ought to be drawn to the things she says are incorrect.

By the Court: Yes, sir, I think so.

By Mr. Long:

Q. Very well, you have just corrected one mistake you made at the former trial; when at the former trial you said you were in the house on the bed when you were informed by one of the section men of the death of your husband, and now you say you were outside. That is true, isn't it?

A. Yes, sir.

Q. On the former trial you said that you saw your husband look back several times and now you say he looked back only once, don't you?

A. Yes, sir.

Q. You said at the former trial, on page 321 of the transcript, referring to the calf, "did your cow have a calf about that time," [fol. 58] and your answer was "the calf was about a week old," and then you were asked "at the time your husband was killed," and you said "yes, sir." You now say the calf was two days old, do you?

A. Yes, sir.

Q. You are better informed now about it than you were then?

A. Yes, sir.

Q. And you made that mistake at the former trial also?

A. Yes, sir.

Q. You are now stating everything exactly right?
A. Yes, sir.
Q. Don't you think you might have made some mistake at this trial too?
A. No, sir, not what I said.
Q. Why did you make mistakes at the other trial?
A. Because I got excited, I suppose.
Q. It was more than a year after the accident, wasn't it; before you testified?
A. Yes, sir.
Q. And you don't think you are liable now to make a mistake?
A. No, sir, what I said is the truth.
Q. But you were liable to make mistakes at the last trial?
A. Yes, sir.
Q. You are not excited now but you were excited then?
A. Yes, sir.
Q. Why is it you are less excited at this trial than you were at the last trial?
A. I suppose my nerves are better.

Witness stands aside.

By Mr. Drysdale: If your Honor please, Essie Wright, would be the next witness to put on and I want to call a witness to explain why she is not here, unless these gentlemen will take my statement for it.

By Mr. Long: We will take your statement for it, but did you summon her?

By Mr. Drysdale: Yes, sir. The explanation is simply this. I had a summons issued for Essie Wright along with the other witnesses and my information was that her home was at Midway and [fol. 59] she would be found there. Night before last, about six o'clock or maybe about five minutes after six, I had just left my office and gotten out in the hall when I heard my telephone ring and I went back and it was one of the officials here, he said he was a deputy sheriff, called me up and said he could not find Bessie Wright but that she was in Lynchburg. I gave information to a brother of my client on yesterday and told him to make an investigation, and he will go on the stand and state that.

By Mr. Long: That is all right, he can corroborate that without going on the stand.

Stuart Hughes sworn for plaintiff.

Direct examination.

By Mr. Drysdale:

Q. Your name is Stuart Hughes?
A. Yes, sir.
Q. Where do you live?
A. Warminster.

Q. That is a station next to Midway, is it not?
A. Just east of Midway, yes, sir.
Q. On the Chesapeake & Ohio Railroad?
A. Yes, sir.
Q. Were you living there on the 21st day of June, 1921?
A. Yes, sir.
Q. How long have you been there?
A. About ten years, or something like that.
Q. Ten years last past from now?
A. Yes, sir.
Q. What was your occupation at that time, I mean in June, 1921?
A. A brakeman.
Q. For the Chesapeake & Ohio Railway Company?
A. Yes, sir.
Q. It is in evidence here that train No. 1008, an extra freight train, I think that is the number and it will be brought out in the evidence here, that it passed Mr. Nixon's house on June 21, 1921. Did you know where Mr. Nixon's house was at that time?
[fol. 60] A. Yes, sir.
Q. When the freight train passed Mr. Nixon's house at that time, going towards Gladstone, and when that train killed Mr. Nixon, tell us what you know about that train passing that particular house?
A. I was breaking on that train.
Q. You were on that train at this particular time?
A. Yes, sir, on June 21st, on train 1008 going west.
Q. Just tell the jury whether or not when you passed Mr. Nixon's house you saw Mrs. Nixon, if so, where?
A. I saw Mrs. Nixon, yes, sir, standing on the porch when the caboose passed there.
Q. That is all you know about the case, I believe?
A. Yes, sir.
Q. Can you tell us the time when the train passed?
A. We passed Warminster about 630: a. m.
Q. And this would be how many minutes later that you passed Mr. Nixon's house?
A. It is a little better than a mile, it is nearly two miles, or over a mile, between a mile and two miles.
Q. Do you know at what rate of speed you were running at that time?
A. Between 20 and 25 miles an hour, or something like that.

Cross-examination.

By Mr. Long:

Q. There was nothing particular about Mrs. Nixon's appearance that attracted your attention, was there?
A. No, sir.
Q. She was just standing there and you happened to see her?
A. Yes, sir.

Q. She appeared to be perfectly composed, didn't she?
A. Yes, sir, she was standing on the porch.

Witness stands aside.

GEORGE CUNNINGHAM sworn for plaintiff.

[fol. 61] Direct examination.

By Mr. Drysdale:

Q. This is Mr. George Cunningham, is it?
A. Yes, sir.
Q. What is your occupation?
A. Farmer.
Q. How long have you followed that occupation?
A. All of my life excepting four years.
Q. Maybe you had better tell us how old you are now?
A. I will be 56 years old the 15th of October.
Q. Do you know the Chesapeake & Ohio Railway beteewn Warminster and Midway?
A. Yes, sir.
Q. How long, if at all, have you lived in the neighborhood of that place?
A. You might say all my life.
Q. You live, I believe, on the other side of the river?
A. Just below. When I was a boy growing up, I grew up in that boundary near Norway to Howardsville.
Q. Did you know Sam Joe Nixon?
A. Yes, sir.
Q. He was related to you, I believe?
A. Yes, sir.
Q. In what way, just tell the jury?
A. He is my nephew.
Q. Do you recollect the date he was killed?
A. Very well.
Q. Tell the jury whether or not you saw this freight train that is said to have killed him, pass?
A. Yes, sir, I did.
Q. Just tell the jury in your own way, as shortly as you can, where you were?
A. I was on the farm right near the river, just the river and the railroad was between me and the train that morning, and it came up from Warminster making pretty good time. He didn't have but eight or ten cars, I didn't count them, but he was running pretty fast, and there was a keen wind blowing from the west that morning.
Q. That was blowing down the track?
A. Yes, sir, against him, and carrying the sound east, you know.
Q. And if Sam Joe Nixon, about that time was making his way [fol. 62] from his house to Midway would the wind be blowing against him or with him?

A. It would be carrying the sound east from him.
Q. The wind would be blowing against him?
A. Yes, sir.
Q. Did you notice whether or not that train blew?
A. It did not blow from Warminster until he got to Wingina.
Q. There is a public crossing at Midway, is there not?
A. Yes, sir.
Q. He didn't blow for that?
A. No, sir, and there is one below Midway, a farm crossing.
Q. The law, as I understand it, only requires them to blow for public crossings. There is a public crossing at Midway?
A. Yes, sir.
Q. And you say there was a stiff wind blowing that morning?
A. Yes, sir, a keen wind, a hard wind.
Q. What called your attention to that? What were you doing at that particular time?
A. I was plowing corn that morning.
Q. And you are quite sure there was a keen wind?
A. Yes, sir.
Q. There was an inquest held over the body of Mr. Nixon a little later, was there?
A. Yes, sir.
Q. You were one of the jurors, were you not?
A. Yes, sir, they called me in.
Q. Did you see the body at the place where he was killed?
A. Yes, sir.
Q. Now Mr. Cunningham, please state whether it would be possible—I presume you have taken notice of it, whether it would be possible for a person standing on the porch at Mr. Nixon's house to see the scene of the accident?
A. Yes, sir, I should think you could.
Q. Have you any idea how far the point where Mr. Nixon was killed is from his front porch—my recollection is you stepped it?
A. Something like 600 and some yards, I couldn't tell exactly the number of feet, but I think as well as I remember, I think that is what we measured six hundred and some yards—I mean feet.
Q. How did you measure it?
A. We measured it by the rails, we counted the rails.
Q. Do you remember how many rails there were?
[fol. 63] A. No, sir, not now.
Q. Do you know how many feet a rail is?
A. Thirty-two or thirty-three feet, as well as I remember, is the length of a rail.
Q. I believe that you stepped at one time from the place in front of Mrs. Nixon's house where her husband put the tricycle on the track, how many steps it would take her to go from there to her porch. Do you recollect what that was?
A. I don't remember now exactly what it was but I think it was something like 20 steps, wasn't it?
Q. You will have to state, I am not testifying.
A. I don't know for certain.

Q. I saw you step it, didn't I?

A. Yes, sir.

Q. My recollection is that you made it 29 steps.

A. Something like that. It was down in the canal and if it had been straight it wouldn't have been as many steps, but you had to go in a ditch and come up the other side, we had to take a circle around, you couldn't come right straight to the house.

Q. Now I show you this map——

By Mr. Long: I think it was agreed before, Mr. Drysdale, that the buildings are not drawn to scale, and the location is not drawn to scale on that map.

By Mr. Drysdale: The buildings are not drawn to scale but it was drawn by an engineer and it is all drawn to scale except the buildings.

By Mr. Williams: I do not think that shows the size of the buildings either.

By Mr. Drysdale: I don't know about that, the jury will see about that.

Q. Now here is a map, Mr. Cunningham——

A. This map is not like the other one you had.

Q. Now if you will look about the center here, you will see the building or residence occupied by Mr. Nixon at the time of the accident—and it is admitted that these buildings are not drawn to scale, they are simply put there to show where abouts the house was. Now [fol. 64] if you will look to your right of that map you will see marked there "bluff," and you can see the railroad track there and the train comes around that bluff, and it would have to come around the bluff before it can be seen by anyone standing on the porch looking to the left. That is correct, isn't it?

A. Yes, sir.

Q. Suppose you come to the left where Mr. Nixon was when he was killed, which is marked at the extreme left, marked "point where accident occurred." Suppose that Mr. Nixon was approximately half way to the point where he was killed from his house, and looked back and the train was coming around the bluff, could he have seen it, if not, why couldn't he have seen it?

A. There is a row of trees along in here that cuts the sight off and he couldn't see until it got up here (indicating). That is a straight line from there to where he was killed and on beyond where he was killed t*aht* is a straight shoot from there to here (indicating).

By Mr. Drysdale: It is understood that this map is in evidence.

Q. There are some other trees that do not appear on this map, as I understand it?

A. Yes, sir.

Q. I don't know whether this question is material or whether these gentlemen will object to it, but it was established at the inquest that Mr. Nixon was killed by the train, wasn't it?

A. Yes, sir.

Q. Is there anything else you know about that case that I haven't asked you?
A. No, sir.

Cross-examination.

By Mr. Long:

Q. You say on the morning of June 21, 1921, when this accident occurred you were planting corn on the opposite side of the river?
A. Yes, sir.
Q. Planting corn?
A. Plowing corn?
Q. What drew your attention to this train?
A. It was running pretty speedy and it was a short train and making such little fuss I just stood and looked at it.
[fol. 65] Q. It made fuss enough for you to hear it.
A. When he got opposite me and after he got west of me the sound came towards me.
Q. It had not made any great noise, you say?
A. It was making it but the wind was carrying it back the other way and I did not hear it until he got almost opposite me.
Q. When you first saw it it was east of you?
A. It was right nearly opposite to me when I saw him.
Q. And you heard enough sound to attract your attention.
A. Yes, sir, after he got up against me.
Q. You say the engine did not blow or that there was no whistle?
A. No whistle or bell or anything until he blew for Wingina.
Q. There was not a public crossing at that place requiring the whistle to be sounded, was there?
A. There is a public crossing at Midway.
Q. Yes, but the accident occurred before he got to Midway.
A. Below Midway.
Q. Before he reached Midway.
A. Yes, sir, but he never blew or rang the bell at Midway.
Q. That did not have anything to do with the accident because the accident had already occurred then?
A. Yes, sir, I suppose so.
Q. You don't mean to say that his failure to blow the whistle at Midway had anything to do with this accident, do you?
A. No, sir, he killed him before he got to Midway.
Q. The man had already been killed?
A. That is right.
Q. There was no crossing before the man was killed that required the whistle to be blown?
A. There is a farm crossing going into the low grounds.
Q. But no public crossing?
A. No, sir.
Q. I do not believe it is contended that there is any requirement of law that he should blow for a farm crossing?

A. It seems to me that he ought to look out. Suppose a man was hung up there with his team, he would have murdered him.

Q. You think he would have murdered him?

By Mr. Drysdale: He said if a man had been there with his team he would have murdered him.

A. His team and himself would have been both torn to pieces if he was broken down and nobody looking out.

[fol. 66] By Mr. Long:

Q. You don't mean to say this man was murdered, do you?

A. No, sir, he wasn't murdered but he was killed by the locomotive.

Q. Now Mr. Cunningham, when did that train first come to a point from which an engineer, if he was looking out, could have seen Mr. Nixon?

A. He could have seen him from the time he got just at the house, from that time until he killed him.

Q. Wasn't there a curve at the house?

A. No, sir, it is just below that house. When that engine was just in front of that house he could have seen a man where he was killed, it is a straight shoot.

Q. You mean the track is straight immediately in front of the house?

A. Yes, sir, I do, there is no curve.

Q. Does your map show that?

A. It shows a gradual bend, but do you see any curve there? Is *is* a straight line.

Q. You think it is a straight line from that house to where the accident occurred?

A. That map curves it a heap more than the railroad curves.

Q. But there is a curve there?

A. It is a gradual curve but that map curves it a heap more so than the road itself.

Q. Now you say the engineer when he was immediately in front of this house, if he had looked out, could have seen the man at the point of accident?

A. Certainly he could. I think if anybody will go there they will agree with me that he could see him.

Q. Have you tested that?

A. Yes, sir.

Q. And you mean to say you could see that point from immediately in front of the house?

A. Yes, sir.

Q. Did you do that?

A. We did.

Q. Where did you do it from?

A. From the house to where he was killed.

Q. And not from the track? The engineer would be over the track, wouldn't he?

[fol. 67] A. If he was on the engine he could see as well as I could see from the house.

Q. What makes you say that; did you ever verify that statement?

A. There is nothing to prevent him, there is not a tree or anything in the way.

Q. What is this line of trees up here (indicating on map).

A. There is no trees up there.

Q. Don't the map indicate trees there?

A. But there is none there.

Q. But don't the map indicate that there are trees there, and that it is a sharp curve here (indicating)?

A. It is gradual but not so sharp as that.

Q. You mean to say, without having tested it, that an engineer here at this point (indicating) could see around that curve to the point of accident?

A. There is no curve there to amount to anything, it is a straight shoot.

Q. Don't you see the curve here?

A. I see it there.

Q. And you say this map is inaccurate?

A. It is not like the track is.

Q. Now the point from which you tested as to whether you could see the scene of the accident was from the porch, up here (indicating)?

A. Yes, sir.

Q. You got up on the porch?

A. Yes, sir.

Q. That is a good way to the north of the track, isn't it?

A. Yes, sir.

Q. About how far?

A. Like I told Mr. Drysdale a while ago, he said he thought it was about 27 steps, or something like that, as well as I remember, I remember stepping it.

By Mr. Drysdale:

Q. That is, going around, 29 steps?

A. Yes, sir.

By Mr. Long:

Q. When you looked from that point, or from the porch down [fol. 68] here to this point where the accident occurred was there any train on the track between you and the point of the accident?

A. None at all at that time but I could tell that I could see a man.

Q. You mean to tell the jury you could tell from looking down there, with no train on the track, if you had been on the porch at the time of the accident you would have been able to have seen the accident?

A. Certainly I could.

Q. When you did not see a train there at all?
A. Yes, sir.
Q. What makes you think that?
A. I could see the spot as plain as I could.
Q. Don't you believe with a train on the track, it would hide the track?
A. If I had been behind the train, but along over there I was kinda on the side, when I was on the porch.
Q. You see here now, if you lined down this track, you see that an extension of the track in a straight line would about hit the end of the porch and you would be immediately behind the train?
A. We took a view of that and you could see a man easily.
Q. That is your idea about it without ever having tested it?
A. Yes, sir.
Q. Mr. Cunningham, you are an Uncle of Mr. Nixon?
A. Yes, sir.
Q. And you served on the Coroner's jury?
A. Yes, sir.
Q. And you testified before that jury, didn't you?
A. Yes, sir.

Witness stands aside.

REESE CUNNINGHAM, sworn for plaintiff.

Direct examination.

By Mr. Drysdale:

Q. Your name is Reese Cunningham?
A. Yes, sir.
Q. You are a son, I understand, of Mr. George Cunningham, who [fol. 69] just left the witness stand?
A. Yes, sir.
Q. How old are you?
A. 21 years old.
Q. You have lived with your father all of your life?
A. Yes, sir, up until about two years ago.
Q. Do you remember June 21, 1921, that is almost two years ago, that Mr. Nixon was killed?
A. Yes, sir.
Q. Mr. Nixon is said to have been killed about six-thirty in the morning. Do you recollect where you were at that time?
A. Plowing corn.
Q. Anywhere near where your father was?
A. Yes, sir, we were plowing right along together.
Q. Do you recollect whether or not it was a still morning or a windy morning?
A. It was a windy morning.
Q. Do you recollect which way the wind was blowing?
A. It was blowing down.

Q. Down the river?
A. Yes, sir.
Q. That is down the railroad track?
A. Yes, sir.
Q. Did you see this train?
A. Yes, sir.
Q. Was the wind blowing against the train or blowing with it?
A. Blowing against the train.
Q. You don't know anything about the circumstances of the killing, I suppose?
A. No, sir.
Q. But you do know the wind was blowing that morning?
A. Yes, sir.
Q. I don't know whether you know this or not, but did you ever stand on the porch at Mrs. Nixon's house and look at the point where her husband was killed?
A. No, sir.
Q. You never did that?
A. No, sir.

No cross examination.

Witness stands aside.

[fol. 70] JAMES R. CUNNINGHAM sworn for plaintiff.

Direct examination.

By Mr. Drysdale:

Q. Your name is James R. Cunningham?
A. Yes, sir.
Q. You are a brother to Mr. Geo. Cunningham, I understand?
A. Yes, sir.
Q. And Mr. Nixon was your nephew?
A. Yes, sir.
Q. Where do you live?
A. I live on a farm they call Willow Bank, a mile and a half east of Warminster?
Q. That is how far from the place where Mr. Nixon was killed?
A. A little over two miles I guess, maybe, 2½ or 3 miles.
Q. How long have you lived there.
A. Where I am now?
Q. Yes?
A. 21 years.
Q. Do you know any of the circumstances in connection with the running of that train on the day Mr. Nixon was killed, if so, tell the jury what you saw or anything that would throw any light on this case?
A. On that morning I was getting my team out and was cutting wheat for a neighbor adjoining me, Mr. Ragland. I was at the

stable when this train passed getting my team out and I noticed it was running mighty light, and going along. I remember that morning that the wind was blowing very hard and we didn't have to wait for the dew to get off that morning, I mean to get off the wheat, and I went to cutting wheat very early. The train passed my house, I don't remember exactly what time, but I suppose it must have been six o'clock or something after that, I don't remember the time exactly.

Q. You recollect, you say, that there was a strong wind?

A. There was a strong west wind that morning, very strong, I reckon as strong or stronger than it is right now out there.

Q. And you recollect that because you did not have to wait for the dew to dry?

A. Yes, sir.

Q. You don't know anything of the actual killing?

[fol. 71] A. No, sir.

Q. Did you attend the inquest?

A. Yes, sir, I was at the inquest. Mr. Ragland and myself went up there after we heard of it, we rode up there.

Q. Did you see his body?

A. They had moved his body before we got there.

Q. You saw the body though?

A. Yes, sir, I saw the body moved into the house.

Q. Of course you cannot tell anything of his injury?

A. No, sir, but it struck him back of the head sorter and knocked a hole in his head, on this side (indicating) I believe.

Q. I suppose you are acquainted with the track from Mr. Nixon's house to where he was killed?

A. Yes, sir, I have been going over that for over 40 years. I used to ride the freight boats by there.

Q. Now this here represents Mr. Nixon's house, and this point here represents the place where he was killed (indicating on map).

A. Yes, sir.

Q. And this is the railroad track here (indicating on map). Kindly state whether you have ever stood on the porch of that house and looked to the point where Mr. Nixon was killed to see whether there was anything to obstruct your view?

A. No, sir, you can stand there and see to where he was struck easy from the house to that place. I don't know as I stood on the porch and looked at the place but I remember standing up here and you could see back here (indicating on map).

Q. Standing at the point of the accident and you say you could see the porch?

A. Yes, sir, and see the porch back here (indicating), but I don't remember whether I got on the porch and looked up that way, or not, I don't remember about that. I do remember looking from the place where he was killed, we went up there, we held an inquest and we were looking back down and I never paid any attention to that when I got back to the house, about looking.

Q. That was at the time of the inquest, was it?

A. Yes, sir.

Q. Do you remember that I came down one time to your brother's place and stood here (indicating on map) and you did the same thing in my presence?

A. Yes, sir, I did the same thing when you were there, I looked back down there.

[fol. 72] Cross-examination.

By Mr. Long:

Q. Your observation of this train was taken from a point somewhere east of Warminster, were they not?

A. I was at my stable.

Q. Is that east or west of Warminster?

A. That is east of Warminster.

Q. How far east of Warminster?

A. A mile and a half or a little over that.

Q. Then you were some three and a half miles from the scene of the accident?

A. Yes, sir.

Q. And this was about six o'clock in the morning, probably?

A. Somewhere about that, it might have been a little after that.

Q. Half an hour or more before the accident occurred?

A. Yes, sir.

Q. When you made your observations to observe whether you could see the porch of the Nixon house from the scene of the accident there was no train on the track, was there?

A. No, sir.

Q. And there was a clear view from the scene of the accident to the porch because there was nothing between you?

A. Yes, sir.

Q. There was no train between you and the porch?

A. No, sir.

Witness stands aside.

Plaintiff rests.

EVIDENCE INTRODUCED ON BEHALF OF DEFENDANT

F. W. DROSTE, sworn for defendant.

[fol. 73] Direct examination:

By Mr. Long:

Q. Please state what your occupation is?

A. Resident Engineer of Construction for the Chesapeake & Ohio Railway Company.

Q. Have you made a map of the scene of the accident resulting in the death of Mr. Nixon, two years ago?

A. Yes, sir.

Q. Please examine this map or blue print and state whether it is a map made by you?

A. Yes, sir.

Q. This map was introduced at the former trial of this case?

A. Yes, sir, it was.

Q. You will please explain to the jury the location of the railroad on this map?

A. The railroad is indicated on this map by a solid line running from east to west. The right-hand end of the map represents a line going to Richmond and the left end to Clifton Forge, the two parallel lines indicating the right of way by a dot and dash line.

Q. What is the length of the track as exhibited on this map?

A. It covers two miles.

Q. Between Warminster and Midway?

A. Yes, sir.

Q. Does it go as far east as Warminster?

A. No, sir, it does not.

Q. At what point does it begin?

A. It starts at 100 mile post and goes to mile post 102.

Q. State what is the situation of the 100 mile post with reference to the bluff around which the track turns going westward?

A. The bluff is west of the mile post, it is a considerable distance west of mile post 100. The bluff is from a point marked "3" on the map to point marked "4."

Q. Please point out to the jury the point on the track where a train coming from the east would first become visible from Mrs. Nixon's house. In her testimony she spoke of seeing the train in question as it rounded the bluff.

A. It is located around Station 5307 plus 7.

By juror:

Q. How far is that from the house?

[fol. 74] A. It is over 600 feet.

By Mr. Long:

Q. Would not that train on the track be visible at a point east of this line here indicated as a line of trees, out this way (indicating on map).

A. No, it probably would go a little beyond this cluster of trees, say two or three hundred feet.

Q. Making about 900 feet in all?

A. Yes, sir.

Q. At a point then about 900 feet east of the Nixon house the engine would be visible?

A. Yes, sir.

Q. From the steps or porch of the Nixon house?

A. Yes, sir.

Q. Now explain to the jury the direction, and especially whether there is a change in the direction of the railway track at a point

just west of the Nixon house? Is there any curve in the track at that point?

A. Yes, sir, it is indicated by Station 5323 plus 11.

Q. How far is that west of the Nixon house?

A. Approximately 300 feet.

Q. Now where does the straight track begin, extending as far westward as the point where the accident occurred?

A. The point that the straight track begins is 5323 plus 11.

Q. What is the distance from that point to the scene of the accident?

A. 1350 feet.

Q. The straight track then, extending westward to the point of the accident would be 1350 feet long?

A. Yes, sir.

Q. And if the engineer were not otherwise engaged and was looking ahead he could have seen Mr. Nixon from that point?

A. Not until after he got on the tangent.

Q. On the what?

A. Not until he got on the straight track or tangent.

Q. When did he get on the straight track, if he had not been engaged in other duties and had been looking ahead, could he have seen Mr. Nixon?

A. Yes, sir.

[fol. 75] Q. What is that distance?

A. That would be 1,350 feet after the engine passed this point of curve, and when the engine was on the straight track, he could have seen that far.

Q. On the other hand, when the engine reached that point could it have been *been* seen by Mr. Nixon?

A. Yes, sir.

Q. If he had looked back?

A. Yes, sir.

Q. Could he have seen the engine before that point?

A. Yes, sir, he could have seen the engine approaching 1,633 feet, indicated on the map by point No. 2.

Q. Could he have seen the engine before the engineer could have seen him?

A. Yes, sir.

Q. Why?

A. The fact that the curvature taken into account, the engineer would follow the line of vision of the boiler and it would have thrown his vision some 40 feet out in the field while the man on the track could have seen the engine where he was at back to the point marked "2" on this map.

Q. What would have been in the engineer's way to have prevented him seeing Mr. Nixon?

A. The front end of the boiler.

Q. That would have intercepted the view and the view would not have been clear or an unobstructed view until the engine came on the straight track. Is that right?

A. Yes, sir, that is right.

Q. Which would be some 300 feet further on?

A. Yes, sir.

Q. You say Mr. Nixon could have seen the engine if he had looked back, when the engine was as far away as 1,600 feet?

A. 1,633 feet.

Q. Now Mr. Droste, did you ever get up on the porch of the Nixon house and look to see whether you could see the scene of the accident from that porch?

A. I did.

Q. It is visible, isn't it?

A. Yes, sir.

Q. Standing on the porch you could see the scene of the accident from the porch?

A. Providing there is no train on the track, yes, sir.

[fol. 76] Q. You tried it with a train on the track and without a train on the track?

A. Yes, sir.

Q. And you could see the scene of the accident when there was no train on the track?

A. Yes, sir.

Q. Could you see it when there was a train on the track?

A. No, sir, I saw it 18 feet at right angles to the north of the track, the furthest point I could see.

Q. As you looked towards the scene of the accident, the point nearest to the accident that you could see on the right-hand side of the track, that is, on the track away from the river, was 18 feet from the accident?

A. 18 feet from the track, yes, sir.

Q. 18 feet north of the track?

A. Yes, sir.

Q. With a train standing on that track, as you looked from the porch, could you see the train itself on the other side of the train?

A. When I was standing on the porch I could see the rear end of the caboose and the south edge of the caboose if I was looking in a line of the point of accident, in other words, it hit the south edge of left-hand side of the caboose, facing the accident.

Q. Could you see the side of the train next to the river, or any part of it?

A. No, sir.

Q. Next to the river, not on the north side, but on the south side?

A. Yes, sir, I could see just a little part of it beyond the caboose.

Q. Do your lines on this map indicate the line of vision from the porch?

A. No, sir, not on this map, but I have prepared a special map for that.

Q. This is the same map that was introduced before?

A. Yes, sir.

By Mr. Long: This map is filed in evidence.

By Mr. Drysdale: All right.

By Mr. Long: We wish to introduce another map prepared with

special reference to this trial showing the situation as it appeared from the test made, indicated by drawing 5711-A.

[fol. 77] The Court: Very well.

By Mr. Long:

Q. The east end of this map begins at what point?

A. At the Nixon house or the section house.

Q. And the west end is where?

A. The point of accident.

Q. This map then shows the railroad track between the Nixon house and the scene of accident?

A. Yes, sir.

Q. Are these buildings drawn to scale here?

A. Yes, the entire map is drawn to scale.

Q. You have on the map we have here a red line which appears to be drawn from the front porch of the Nixon house to the scene of accident. On which side of the track does that red line lie?

A. It crosses the line in two places, but mostly on the north side of the track.

Q. At a point next to the Nixon house on which side of the track, is it?

A. It is on the north side, crossing the main line at a point marked "2."

Q. How far is that point "2" from the front porch?

A. 325 feet.

Q. From that point on the red line in south of the track, isn't it?

A. Yes, sir, to a point marked "S. 6,732½" west where it crosses the track to the north side again.

Q. Do you indicate on the map a train of cars?

A. Yes, sir.

Q. At what point?

A. At a point 40 feet east of the point of accident, engine, caboose and ten cars.

Q. Was that about the length of the train in question?

A. Yes, sir.

Q. Where does the line of vision strike that train?

A. It strikes the train at the north or right hand side of the caboose just about mile post 101. The line of vision passing alongside of that would pass at the point of accident 18 feet from the main line track.

Q. Now Mr. Droste, you have explained to the jury what is shown on this map. Did you actually take your stand on the porch here?

[fol. 78] A. Yes, sir.

Q. You actually looked in that direction?

A. Yes, sir, we stopped a train there.

Q. With a train in that position?

A. Yes, sir.

Q. And could you see the scene of the accident?

A. Just what we have here on this map, no sir, you could not.

Q. If you had been standing on the porch at the time the accident

occurred, how far would Mr. Nixon have to be thrown from the track in order for you to have seen his body?

A. He would have to be thrown 18 feet.

Q. Who was present with you, if anybody, when this test was made?

A. Mr. Guyer, Mr. Douglass, and Mr. Williams.

Q. You mean Mr. Williams, who is counsel in this case?

A. Yes, sir, and two of the other witnesses. I think the operator and Mr. Desper was on the porch at the time.

Q. How far is the front porch of the house from the track?

A. 74 feet six inches from the center line of the track.

By Juror:

Q. How far was the body thrown from the track?

By Mr. Williams: He cannot testify to that, he wasn't there.

By Mr. Long:

A. I don't know.

Q. What is the elevation of the front porch floor above the track?

A. Five feet.

Cross-examination.

By Mr. Drysdale:

Q. What was that line of vision made with, the naked eye or an instrument?

A. The naked eye.

[fol. 79] Q. Do you mean to say that the vision does not spread, I mean the vision of the eye doesn't spread the further away an object is from the place where a person is standing?

A. That is very true, but it cannot spread beyond the line that obstructs your vision.

Q. You say this is the length of the train here?

A. Yes, sir.

Q. And the body had to be thrown more than 18 feet?

A. Yes, sir.

Q. You don't know how far the body was thrown from the track, do you?

A. No, sir.

Q. And this has been made since last April?

A. Yes, sir.

Q. Is this train exactly similar or exactly identical with the train that killed Mr. Nixon?

A. I would say that it was, although we did not have the contents of each individual car but we had the same number of cars and the same type of engine.

Q. The same description of cars, but were they box cars or what?

—. A few box cars, and a few flat cars.

Q. That would have made a difference in the vision. You could have seen over flat cars when you couldn't have seen over box cars?
A. No, sir, the caboose is the same on all of the trains.
Q. You couldn't see beyond the caboose?
A. No, sir.
Q. You say the house is how far back from the track?
A. 74 feet 6 inches.
Q. That is from the nearest rail or from the center of the track?
A. From the center of the track.
Q. How far would that be from the nearest rail?
A. Take two feet off that.
Q. The rails are four feet apart?
A. Four foot eight and a half inches, that would be two feet 4 and a quarter inches.
Q. Now let us go back to the original map which was filed last April. This point here (indicating) a little bit to the left of the center of the map, that is the point of accident, isn't it?
A. Yes, sir.
Q. And going along the track in the direction of Mr. Nixon's house how far is the line directly straight?
[fol. 80] A. 1,350 feet.
Q. That is the distance, I understood you to say, the engineer could have seen if he had been looking?
A. After he rounded the curve.
Q. Couldn't he see before he rounded the curve?
A. No, sir.
Q. Could the fireman have seen if he had been looking before he rounded the curve?
A. Yes, sir.
Q. How far a distance could he have seen?
A. He could have seen quite a little distance, I expect.
Q. I would like for you to tell the jury just how far?
A. I would say 1,350 feet.
Q. That is just what you said the engineer could see?
A. No, sir, I said he could see that 1,350 feet after he was around the curve.
Q. What was there to prevent the fireman from seeing, he looks on the left-hand side of the engine, don't he?
A. Yes, sir.
Q. What was there to have prevented him from seeing beyond the scene of the accident?
A. There was trees all along there—the same reason Mr. Nixon couldn't see any further than 1,633 feet, the fireman couldn't have seen any further than 1,633 feet either.
Q. What sort of trees were they, they were not high trees were they?
A. Shrubbery.
Q. How tall?
A. I would say probably 15 feet high or possibly 20 feet.
Q. Do you mean to say there was shrubbery that would interfere with the view of a man standing on the deck of an engine?

A. Yes, sir.

Q. What sort of shrubbery was it and on what side of the track was it?

A. On the south side of the track.

Q. Wasn't that plain farming ground and no shrubbery there whatever.

A. There are trees along there.

Q. Isn't it a fact that there is a big clump of trees way to the east of the Nixon house and that is what you are thinking about?

A. No, sir.

[fol. 81] Q. Mr. Nixon could have seen for how many feet, if he had looked back?

A. 1,633 feet.

Q. What was there to prevent the fireman from seeing him that same distance or more?

A. Nothing to prevent him from seeing that distance if he had been leaning out of the cab window.

Q. Suppose he had been looking straight through the window that is put there for the purpose of looking out?

A. His line of vision would have to pass right in front of the air pumps.

Q. Then neither the fireman or the engineer could have seen it?

A. The fireman could not have seen the point of accident, unless he had leaned out of the cab window.

Q. At what distance?

A. 1,633 feet.

Q. At 1,350 feet either one could have seen a man on the track and he could have seen beyond the point of accident.

A. He could have seen to the next curve beyond.

Q. Do you know how long it would take a train rounding 25 miles an hour to run that 1,350 feet?

A. I don't know off-hand.

By Mr. Williams Can you calculate that for Mr. Drysdale?

By Mr. Drysdale: Never mind, I think I can get at it without that.

Q. You say the floor of the porch is only five feet above the rail?

A. Five feet above the base of the rail.

Q. The ground on which the house stands, Mr. Droste, is that higher than the rail, or lower, or do you remember?

A. It is a foot and a half lower right at the canal lock and is just exactly level with the track at the porch.

Q. My recollection is that at the last trial some witness testified that you could stand underneath the porch, some grown man testified to that I think?

A. If he would be four feet five inches he probably could.

Q. You couldn't stand under it?

A. No, sir, I could not.

[fol. 82] Q. Now I think you said that a train coming around the bluff, that is, to the east of Mr. Nixon's house, I understood you to

say it would be 900 feet and a person standing on the porch could see it??

A. Yes, sir.

By Mr. Long:

Q. When the engine reached the straight line of the track how would the fireman be able to see the scene of the accident?

A. By leaning out of the cab window.

Q. If he kept his seat in the cab, his usual place, and looked out of the window in front of him, could he have seen it?

A. No, sir, those air pumps are right in front of his window.

Q. So his being able to see the scene of the accident at either point that you have testified about would depend on his leaning out of the cab window and looking forward?

A. Yes, sir, he has no vision whatever to the front of the engine except out on the side, looking out of the side window.

Q. And the engineer himself would have been able to command a view of the scene of the accident looking through the front window of the cab only when the engine got on the straight track?

A. Yes, sir.

Witness stands aside.

C. J. GEYER, sworn for defendant.

Direct examination.

By Mr. Long:

Q. Please state to the jury what your occupation is?

A. Division Engineer for the Chesapeake & Ohio Railway Company, Richmond Division.

Q. Where is your residence?

A. Richmond, Virginia.

Q. How long have you been in the employment of the Chesapeake & Ohio Railway Company?

A. About 13 years.

Q. Are you familiar with the situation between Warminster & [fol. 83] Midway where the accident occurred two years ago which is involved in this case and which resulted in the death of Mr. Nixon?

A. Yes, sir.

Q. Have you made yourself especially familiar with it in connection with your investigation of the accident?

A. Yes, sir, since the accident I have been over all of the ground.

Q. We have just introduced and proved by Mr. Droste a map filed as an exhibit in this case. Have you seen this map?

Yes, sir.

Q. This is the map that was introduced at the former trial?

A. Yes, sir.

Q. Without going into details, are you able to verify the map as accurate?

A. Yes, sir, the map is accurate so far as I can see from the general alignment of buildings, etc.

Q. The location and curves of the track?

A. Yes, sir.

Q. Have you yourself taken part in the surveying and mapping of any part of this territory shown on this map?

A. No, sir.

Q. I show you also a map made of a portion of the same territory beginning at the Nixon house on the east and extending just beyond the scene of the accident. Are you familiar with this map?

A. Yes, sir.

Q. Did you have any part in making it?

A. Yes, sir, I was with Mr. Droste at the time a great many of these measurements were taken and assisted him in the location of some of the points.

Q. Now it appears that an actual test was made as to the visibility of the scene of the accident on the porch at the Nixon house. Did you take part in that test?

A. Yes, sir, I was there and we had a train run over this section of the track with a man on a velocipede ahead of it. I stood behind the Nixon house approximately at the point marked "A."

Q. You stood at the point marked "A" behind the Nixon house. What was your observation from that point?

A. My observation from that point was that I could see the track at the point marked "No. 1" on this map, when the front of the engine was 40 feet east of that point.

[fol. 84] Q. What was your observation from the front porch of the Nixon house?

A. From the front porch I was looking directly into the rear of the train.

Q. Could you see the scene of the accident with the train in position near the accident.

A. No, sir, that was impossible, the line of vision was right into the rear of this train or the caboose.

Q. Have you any familiarity with the duties of a section foreman?

A. Yes, sir.

Q. How did you come to have such familiarity?

A. I am division Engineer in charge of Maintenance of the physical properties on the Richmond Division.

Q. And a part of the duties of a section man, including the foreman, would be to see to the maintenance of the track?

A. Yes, sir, and the section foremen are under my department.

Q. Explain briefly to the jury what are the duties of a section foreman?

A. The duties of a section foreman are to see that the track is kept in safe condition for the passage of trains at all times, to see that materials are used in an economical manner; that he gets full efficiency from the laborers, or his force, and to keep everything clear ahead for expected or unexpected trains.

He has full charge of a certain number of miles of track. He is

made foreman on his general ability and knowledge of how to maintain the track, his character and his ability to handle the men. He understands that it is his duty to keep everything safe for the passage of trains and to take care of his men and get them off the track and all of his tools.

Q. What was the extent of track under the supervision and control of Mr. Nixon?

A. Six miles.

Q. Between what points?

A. Just east of Warminster to just west of Midway.

Q. His tool house was at what end of his section?

A. It was at Midway, a little nearer the west end than it is the east end.

Q. When they were at work on the track anywhere what was the duty of the foreman, and you might say also of the men employed by him, in respect to keeping a lookout for trains on the track?

[fol. 85] A. It is the duty of the foreman to keep a lookout in both directions at all times, when he is on the track in order to see that everything is in readiness for the passage of trains, to take care of the safety of his men and also of the safety of trains. He understands that he must do that in order to be an efficient foreman.

Q. Does he know from the system of operating trains, or would he know at what time to expect trains always?

A. No, sir, he cannot tell what time all trains are due. The only trains that he could know what time they are liable to come are the scheduled passenger trains, and one or two scheduled freight trains, but we run a good many extra freight trains that are not on the time table, and the section foreman understands that those trains are liable to come at any time.

Q. Do you know whether Mr. Nixon himself understood those rules?

A. Yes, sir, Mr. Nixon was an efficient foreman and understood that trains run at all times without any warning to him as to when they are coming.

Q. Would there be any way for an engineer and fireman operating trains, especially if they are special trains, any way by which they could know when to be on the lookout themselves for section men at work on the track?

A. No, sir. The section foreman with his force works over a section six miles long, and he is liable to be at any point in the six miles and the engine crew doesn't know where to look for him and they do not make any attempt to look out because they know that the section foreman is looking out for them and that it is their duty to have the track safe for them to go ahead. Of course if the track is not safe the section foreman's duty is to put out signals to stop the trains.

Q. If there is any occasion for a train crew to be notified with reference to the track or section men on the track, signals are put out by the men at work, that is, the section men?

A. Yes, sir, the section foreman would instruct his men to flag the train with proper signals.

Q. Is there any use made of torpedoes for signals?

A. Yes, sir, proper flagging signals, is a red flag in the hands of a flagman and torpedoes to attract the attention of the engineer, so that if he is engaged in any other duties he will look out when he hears these torpedoes expecting to see a red flag or a fuzee if at night, ahead of him.

Q. The safety then of the track men or section men at work on [fol. 86] the track depends, under this system which you have described, on their own diligence in keeping an outlook to some extent, does it?

A. Yes, sir, it is bound to be so, because there is no way of notifying them they are away from a telegraph office.

Q. Do you know whether there are any special rules in force with respect to the duty of engineers and firemen operating trains being on the lookout for section men at work on the track?

A. No, sir, there is no rule that compels an engineer and fireman to look out for the section men.

Q. In respect to them, they maintain only such a general lookout as belongs to the proper discharge of the duties of their office?

A. Yes, sir, that is the rule governing the lookout of an engine crew.

Q. I think it has been stated by Mr. Drysdale, and I think by Mrs. Nixon probably, and maybe you can verify that statement. Do you know what pay was received by Mr. Nixon?

A. It was 133.66 per month at the time he was killed.

Q. What is the present rate of pay for men occupying his position?

A. The present rate of pay is $118.00 per month. There has been several changes since Mr. Nixon was killed.

Q. Were you present at Warminster or Midway at the time of this accident?

A. No, sir.

Q. You know nothing about the accident itself then?

A No, sir.

Cross-examination.

By Mr. Drysdale:

Q. That track that we have been speaking of is one over which interstate trains run?

A. I don't know that I would be competent to say whether they are interstate trains, or not. Trains that move over that track are made up at Gladstone and Richmond and of course it is traffic that is moved from other points to Gladstone and Richmond.

Q. Don't you know as a matter of fact that trains run say from Richmond right straight through to West Virginia, over that track?

A. Not without being cut up and switched out at the different terminal points. There is no train made up solid at Richmond and run straight through to West Virginia.

[fol. 87] Q. Admitting that, but goods and passengers that are hauled over that line are taken into West Virginia by the Chesapeake & Ohio Railway Company?

A. That is a fact, without unloading of the cars.

Q. In other words, that track is used for Interstate traffic?

A. I cannot answer that.

Q. And you are the division *ne*gineer?

A. I am not competent to pass on that, I don't think.

Q. Then they had better get somebody else in your place, I think. Now as a matter of fact you do know that goods and passengers are hauled over that piece of track that we have been speaking of into West Virginia and points beyond that State?

A. Yes, sir, I understand that produce loaded in a car at Richmond would move out of the State.

Q. In other words, that piece of track was used for interstate traffic, wasn't it?

A. That is all I can tell you about it.

Q. Will you say that piece of track was not used in interstate traffic?

A. No, but I say I am not competent to pass on that. I am not a legal light and I don't know what it is.

Q. It does not need a lawyer to tell that. All right. Now that piece of track we have been speaking of is a piece of track that was in charge of Mr. Sam Joe Nixon, to keep it, as you said, in good physical shape, for the trains to pass over it. That is correct, isn't it?

A. Yes, sir.

Q. Now what do you know about the duties of an engineer with respect to keeping a lookout?

A. The general rule in the rule book is that the engineer and fireman shall keep a lookout ahead.

Q. That is the general rule?

A. Which is in the rule book.

Q. It is the general rule that an engineer shall keep a lookout ahead at all times for obstructions and to guarantee the safety of the crew, passengers, and goods, that might chance to be aboard the train, isn't it?

A. I think that is the rule and he has to attend to his duties and keep everything in a safe condition, so far as he can?

Q. And it is the duty of an engineer to keep a constant lookout except as he is prevented from doing that by other duties more imperative?

A. That is right.

[fol. 88] Q. And the same thing is true as to the fireman, isn't it?

A. Yes, the same rule applies to the fireman.

Q. Now, I want to be sure that we understand this thoroughly. It is the duty of the engineer to keep a constant lookout ahead except as he is prevented from doing that by other imperative duties, in other words, duties of more importance, that is correct, isn't it?

A. Yes, sir, that is in the rule book.

Q. And the same thing is true as to the fireman, unless he is fir-

ing or doing some other imperative duty, absolutely necessary at the time, it is his duty to look out?

A. Yes, sir, that is the rule in the book.

Q. Then when you said a little while ago that there was no rule making it incumbent on the engineer or train crew to keep a lookout for track men, you meant no special rule in favor of the track men?

A. There is no rule that mentions about train crews keeping a lookout for the track men.

Q. It would undoubtedly be the duty of an engineer or fireman, if he discovered the track man in a position of peril, with something to indicate that the man could not or would not help himself, it would be the duty of that man to stop or at least give notice to the man of the coming of the train?

A. Yes, sir, in that case he would have to stop, but an engineer seeing a section foreman or any other employees on the track ahead of him, he would assume that the men would get out of his way because he knows that it is the duty of the track force to get out of the way of trains and to keep them moving.

Q. Do you mean to tell this jury if that engineer had been on the lookout and had seen Sam Joe Nixon travelling away from him, with his back to him and apparently unconscious of his danger, wouldn't he put his hand up onto the whistle and give a toot, toot, toot, and wouldn't that man have jumped off in a second?

A. Yes, sir, probably he would, if he got close to him and saw that he was not going to get off.

Q. That would have been his imperative duty under the rules of the company, wouldn't it?

A. Yes, sir.

Q. You say that the train crews have no knowledge of the whereabouts of the track men that might be working at any part of that six miles?

A. Yes, sir.

Q. But that is not true at seven o'clock in the morning, is it? Isn't [fol. 89] it a fact that the section foreman meets his crew at the tool house every morning, and repairs to wherever he has been working or left something unfinished the day before?

A. Yes, in the ordinary course of his work he goes to work at seven o'clock in the morning and starts from the tool house.

Q. He meets his crew and then goes out to some point on the track?

A. Yes, sir.

Q. Can you tell this jury that the engineer and fireman of that train did not know that Mr. Nixon lived in this particular house and that was his habit?

A. No, I don't know what the engineer and fireman knew, I couldn't say as to that.

Q. Then you don't know whether or not the engineer and fireman knew that Mr. Sam Joe Nixon lived there, and that he was the section foreman and he was in the habit of using this tricycle in going to his work every morning?

A. No, I don't know that they knew it.

Q. It is practically the universal habit for section foremen to use those tricycles, isn't it?

A. Yes.

Q. And the train crews know of that habit, don't they?

A. Yes, I should think they would know it.

Q. Now with respect to signals, what is the usual signal used by a track man to attract the attention of the train crew in the day time?

A. Torpedoes and a red flag.

Q. Which comes first?

A. Both come together. They put a torpedo down on the track and then go beyond the point where they put the torpedoes down in order to attract the engineer's attention so he will be sure to look out and see the red flag.

Q. Are torpedoes used invariably?

A. Yes, sir, it is the rule.

Q. They must be used always?

A. Yes, sir.

Q. Is there any particular signal to give for a torpedo, for example, does one torpedo mean stop, does two mean caution, or what does it mean?

A. You mean the present rules?

Q. Tell us what the rule was two years ago, at the time of the accident?

A. It was the same as now. The rule is to put down two tor-[fol. 90] pedoes, but one torpedo means the same as two. It is a caution signal to call the attention of the engineer that there is an obstruction ahead, of some kind.

Q. Those torpedoes are loud enough to be heard by the engineer and fireman on the train?

A. Yes, sir.

Q. They could not be mistaken for any noise made by the engine, such as blowing off of steam or anything of that kind?

A. No, sir, it is a sharp report.

Q. In spite of that it is the duty of the engineer and fireman to keep a lookout ahead all the time unless, as I said before, they are prevented from doing so by other imperative duties?

A. Yes, sir.

Q. I believe you told us you had no part in the making of this first map?

A. No, sir, I had no part in it.

Q. Now passing the Nixon house and going west, that was the direction of the spot where the man was killed, how far would an engineer have a straight view from the time that the straight track came into his view, how far was it from there to the scene of the accident, how many feet?

A. 1511 feet of straight line east of the point marked No. 1 on this map.

Q. If I understand you correctly, the engineer, had he been keep-

ing a lookout could have seen from where he first came into view to the point of the accident 1511 feet. Is that correct?

A. I should think he could.

Q. Suppose Mr. Nixon at that time had looked back, how far could he see the train?

A. I cannot say the exact distance he could have seen the train, but there is a possibility that he could have seen it for about 3800 feet.

Q. 3800 feet?

A. Yes, sir, there is a possibility that he could have seen it that far. There is nothing that I know of that would obstructed the view across this curve (indicating).

Q. Nothing that would have obstructed his view. Then there were no trees there to obstruct his view?

A. There was some trees along at various point but his line of vision would have been across this flat land.

Q. If that is true as to Mr. Nixon why isn't it true as to the engineer?

[fol. 91] A. Because the curve obstructs the engineer's view. The curve going west is a left-hand curve and the engineer is sitting on the right-hand side of the engine and the boiler head obstructs his view.

Q. How as to the fireman?

A. The curve is in favor of the fireman's side.

Q. He could have seen it then?

A. I say there is a possibility that he could have seen it. I don't know it is a fact because I never got up there and looked at it.

Q. How many feet did you say that was?

A. 3800.

Q. As a matter of fact, standing on the porch at Mr. Nixon's house, looking towards her left, I think that is in an easterly direction, how many feet would that be where she could first see around, coming around that bluff?

A. The bluff isn't shown on this map. I don't know just what point he would come into view from the Nixon house.

Q. There is a curve shown on there. How far is it—assuming what I think is a fact, that the curve comes around the base of the bluff, tell us how many feet it would be, judging from that.

A. There are several curves here east of the Nixon dwelling.

Q. As a matter of fact you have not examined the location with respect to that map, have you?

A. Yes, sir, I examined the location.

Q. When and how frequently?

A. About two months ago, I believe it was.

Q. You testified at the last trial of this case, which I think was in the beginning of October, that you had examined it before that time, didn't you?

A. Not with reference to this accident, I had not examined it at the last trial.

Q. Now at the last trial, if my notes are correct, and I do not pretend to say my recollection, of course, of the matter is correct, but

according to my notes at the last trial you testified there was a straight track for 1373 feet, looking towards the west. Is that right?

A. I don't know what that was in reference to.

Q. All right, I don't care to ask you anything more.

By Mr. Long:

Q. Just a minute, do you happen to know at what time the section men along this time went on duty in the morning?

[fol. 92] A. At 7 a. m.

Q. It appears that this accident occurred at 25 minutes before that hour. According to the rules was there any reason why an engineer should expect a section hand to be at work on the track before the hour of seven o'clock arrived.

A. No, sir, they had no reason to expect that.

Q. Have the engineers any other duties to perform besides looking ahead?

A. Yes, sir, they have a great many other duties, in the care of their engine, a good many duties connected with the care of their engine.

Q. The operation of the engine is in a large part the work of the engineer, isn't it?

A. Yes, sir, he is responsible for it.

Q. Does he have to make any adjustments of the machinery of the engine in the operation of it?

A. Yes, sir, there are various adjustments required from time to time on his run.

Q. There are times then, when, instead of looking ahead, he has to be busy with his engine?

A. Yes, that is right.

Q. Do you know anything about the importance of the proper observation of the working of the lubricator of an engine?

A. Yes, sir, if the lubricator was not working properly it would ruin the engine and it could not do its work.

Q. Is that appliance one that needs attention on every run of any distance?

A. Yes, sir, it is regulated at different times by the engineer.

Q. When he is attending to the lubricator can he also look ahead?

A. No, sir, he cannot do both. The lubricator is located in the top of the cab and it is necessary for him to get up on the seat box to examine his lubricator.

By Mr. Drysdale:

Q. Isn't it the habit of section foremen to get to their tool house some little time before seven o'clock in order to have their men and materials all ready for to start at seven o'clock?

A. They are required to start out from the tool house at seven o'clock but they are not required to do anything before that time.

Q. If they are required to start out at seven o'clock in the morn-

[fol. 93] ing, and it is necessary to gather some tools and materials

and things of that kind, wouldn't that have to be done before seven o'clock?

A. No, sir, their work does not start until seven o'clock.

Q. Isn't it the invariable rule of a good foreman—and I suppose you will admit that Mr. Nixon was a good man?

A. Yes, sir, he was.

Q. Isn't it the habit of a good foreman to get on the job a little while before starting?

A. I expect they would be there a few minutes before seven.

Q. Mr. Nixon had to go a distance of what—a mile or a mile and a quarter?

A. About a mile and two-tenths.

Q. That is just a mile and a quarter?

A. Yes, sir.

Q. Those velocipedes do not go very fast, do they, without considerable exertion?

A. No, sir.

Q. How fast would they go? Four or five miles an hour?

A. I never timed one but they would probably run about that distance say in nine or ten minutes.

Q. So if this man was killed at 25 minutes to seven o'clock he was allowing himself 15 minutes to get ready to start out. That is about right, isn't it, if he run that distance say in ten minutes he would have gotten to the tool house about a quarter to seven?

A. He was almost at the tool house when he was killed.

Q. No, sir, he was a considerable distance from the tool house; the tool house is way down near Midway.

A. The tool house is at Midway but he had a little less than a mile to go I reckon it would have taken him about seven minutes to run the balance of the distance.

Q. Suppose there was a strong wind ahead of him, that would retard his progress and render his progress slower, wouldn't it, or make him go slower?

A. Yes, sir.

Q. Those machines are pretty heavy, aren't they?

A. No, sir.

Q. Have you any idea how much they weigh?

A. No, I don't know, I never did see one weighed, but one man could life the whole thing clear of the ground, I know men that do that.

Q. That machine, they call it a tricycle, there are two wheels on the right-hand rail and one wheel on the left?

[fol. 94] A. Yes, sir.

Q. And the man sits over the right-hand rail in propelling it?

A. Yes, sir.

Q. If a man was struck by the cow catcher he would be thrown to the right-hand side, wouldn't he?

A. Yes, sir.

Q. How far was Mr. Nixon thrown to the right, do you know?

A. I don't know.

Q. This lubricator is the machine that feeds the oil to the cylinders, isn't it?

A. Yes, sir.

Q. And that works automatically according to the way it is set?

A. Yes, sir.

Q. It is like turning on water, if you turn on a little there is a little stream and if you turn it a little more there is a little larger stream, and if you turn it on full, there is a full stream?

A. Yes, sir.

Q. Now suppose the only object of the engineer was, not because his engine imperatively demanded this oil, but he wanted to put this oil in his engine, before the engine reached Gladstone rather than have it spill-d at Gladstone, you wouldn't call that an imperative duty to keep him from looking out, would you?

A. If that was a fact I wouldn't say it was.

By Mr. Long:

Q. Did you actually make a test of a man running on a velocipede from Mr. Nixon's house up to the tool house?

A. I timed the man making the run.

Q. What time was it?

A. It was between 9 and 10 minutes by my watch, from his house to the tool house at Midway. This man was going at the average rate of speed, that is, the ordinary way of travelling.

Q. Did he have anybody with him?

A. On the velocipede?

Q. Yes?

A. No one on the velocipede with him. There was several of us on the lever car ahead timing him, or behind I believe we were.

Q. Do you r-call who it was that operated the tricycle?

A. The track walker operated the tricycle.

Q. Do you remember whether Mr. Dunn was on the tricycle with him, to refresh your memory?

[fol. 95] A. I believe he was, since thinking of it, I believe Mr. Dunn was on the tricycle with him.

Q. If that is true there were two men on the tricycle?

A That is true if Mr. Dunn was with him.

Q. And they made the time in about nine minutes?

A. Between 9 and 10 minutes.

Q. Don't you think that Mr. Dunn would have been just as much of an impediment as a strong wind?

A. Probably he would, with an extra man on those velocipedes it is pretty hard to pull.

Q. He is very much handicapped, just as a man would be in running a velocipede against a strong wind?

A. I tried to pull a velocipede with another man on behind and it was a pretty hard job.

Q. Is that up grade or down grade where that man ran?

A. Practically level.

Q. You said at first there wasn't anybody on the velocipede and you said one of these track walkers, or a colored man was pulling it?

A. Yes, sir.
Q. That was Bill Venable, wasn't it?
A. Yes, sir.
Q. You said at first there was nobody on and now you remember that Mr. Dunn was on?
A. Yes, sir.
Q. I am very glad that someone else has a defective memory besides Mrs. Nixon. All right, you can stand aside. One minute. I take it that there was no strong wind blowing that day?
A. I wasn't there.
Q. You were not there?
A. You mean the day we made the trial?
Q. Yes, sir.
A. No, sir, no wind that day.

Witness stands aside.

T. J. West sworn for defendant.

Direct examination.

By Mr. Long:

Q. Where do you live?
[fol. 96] A. Near Warminster, about a mile from Warminster.
Q. Are you in the employment of the Chesapeake and Ohio Railway Company?
A. Yes, sir, I am a telegraph operator.
Q. At what point?
A. At Warminster, Virginia.
Q. In connection with your duties have you any knowledge of the movement of trains or the particular train that killed Mr. Nixon?
A. Yes, sir. I keep a record of all movements of all trains and kept a record of the train that was supposed to have killed Mr. Nixon.
Q. What does your record show with respect to its leaving Warminster and its trip west?
A. It shows it arrived there at 6:25 and stayed there five minutes and left there at 6:30 on a clear block, that is, no obstruction between Warminster and Greenway, 19 miles, is my recollection.
Q. You had better use your book and testify from that.
A. Engine 1008, known as an extra arrived at Warminster 6:17. I was under the impression it arrived there at 6:25, and left Warminster at 6:30 on a clear block, no obstruction between Warminster and Greenway, a distance of about 17 or 18 miles.
Q. Explain to the jury what you mean by a clear block?
A. That means a distance between two given points, two telegraph offices, no obstruction, no train moving between those two points at the time this train is occupying it. I have to signal and show the condition of the block if there is any train in there, going either way. I have to signal and show it is red or white or whatever it is.

Q. The information to the Engineer was that he had a clear block between Warminster and Greenway, a distance of 19 miles?

A. 14 miles?

Q. That meant that this train had the right of way over that track, didn't it?

A. Yes, sir.

Q. And that there was no other train on it?

A. No, sir.

Q. And no other obstruction on it?

A. No, sir.

Q. Did you make any observation as to the state of the weather that morning?

A. Not at the time the train was passing, but I don't remember that there was any wind blowing. It was clear and the sun was about up, or it may have been up sometimes. I don't know what time the sun rose, but I know it was clear and I don't remember any wind being blowing.

[fol. 97] What time did you go home that morning?

A. I left my office at seven o'clock. My relief comes on at seven o'clock in the morning, and I went home immediately after my relief came on.

Q. When did you hear of this accident?

A. I did not hear of it until I arrived at home, ate my breakfast, and put my horse away and ate my breakfast and came out to go to the field to attend to my regular duties.

Q. Who brought the information to you?

A. A colored man by the name of Tarleton Fleming.

Q. Was he one of the section men?

A. Yes, sir.

Q. Who had worked under Mr. Nixon?

A. Yes, sir.

Q. How did he come to bring the news to you?

A. He came there to tell me that Mr. Nixon was killed and Mrs. Nixon had sent for my wife to come down as so-n as she could.

Q. How near neighbors were you and Mr. Nixon's family?

A. She lived in the middle of my farm, about three-fourths of a mile from the house, in a direct line.

Q. Did you go down to Mrs. Nixon's house?

A. Yes, sir.

Q. Did you see her?

A. I don't remember seeing Mrs. Nixon only in another room.

Q. Did you have any conversation with her?

A. I did not.

Q. Did your wife go there?

A. Yes, sir, she went.

Q. About what time of day did you arrive there?

A. I don't know the exact time. I arrived at home about 7:30 and ate my breakfast and came out and Tarleton Fleming came and told me that Mr. Nixon was dead, and I went back and told Mrs. West, my wife, and she and I went down the road together part of the way and I stopped in the field where the hands were cutting wheat

and she came on, and I followed in about 20 minutes after she had left me but I don't know exactly what time it was when I arrived at the house.

Q. Was it as late as eight o'clock when Fleming got to your house?

A. It was about 7:45 or near eight o'clock, but I didn't look at my watch, because I had eaten my breakfast and got ready to go to work when he came up.

[fol. 98] Q. What was the work that was going on on your farm?

A. I was cutting wheat.

Q. Was there any such wind blowing as to interfere with the cutting of the wheat?

A. No, sir, I was cutting with a dropper and a dropper is a mower with attachments to it and if the wind was blowing or the air was stirring it raises the wheat and if there had been a good air stirring I would have noticed it from making it difficult to cut.

Q. Do you know anything about Mr. Nixon keeping a cow?

A. Yes, sir, I knew he had a cow.

Q. Do you know whether he milked the cow, or not?

A. I never saw him milk the cow.

By Mr. Drysdale: If your Honor please, I do not wish to prevent any fact coming out that is material to the issue in this case, but I do think that the cow matter is an entirely collateral matter that was brought out by the other side on cross-examination and they are bound by Mrs. Nixon's testimony. If your Honor wants to see any authority on the point I have it with me and I would like to pass it to you.

By Mr. Long: I do not think it is merely a collateral matter. It has a very important bearing on the status of Mr. Nixon before his time of work began for the railroad company. One of the questions in this case is whether he was on duty when he was killed, and in our view of the case he left his house not at such time as would put him at his place of work but at such time as would put him there so as to give him an opportunity to attend to work of his own, his own private work, and his movements were regulated and adjusted with reference to work he had in hand for himself and I take it to be something more than a mere collateral question.

By Mr. Drysdale: Mrs. Nixon testified that at that particular time the cow was dry and had not been milked for two months and I think it is irrelevant and object to anything further being said about the cow.

By the Court: I think they have a right to follow it up.

Plaintiff excepts.

[fol. 99] By Mr. Long:

Q. Do you know what his habit was with respect to milking that cow, from your own observation or from his statement to you?

A. I only have knowledge of his statements when he moved down there. Mr. Nixon and I were good friends and when the grass came out I offered him, I said he could put his cow in my pasture

and he replied that he would rather keep it at Midway in order to that he could attend to it and milk her while he was going backward and forward to Midway night and morning.

Q. Did you go to the scene of the accident before Mr. Nixon's body was moved?

A. Yes, sir—how is that?

Q. Did you go to the scene of the accident before his body was moved away from there?

A. No, sir, I didn't go up there at all.

Q. Were you present when a test was made as to the visability of that point from the porch of the Nixon house?

A. Yes, sir, later on, at a later date.

Q. Could you see the point of accident from the porch when there was a train at that point on the track?

A. No, sir, I couldn't see it when the train was between the house and the bridge, it was impossible to see it because the train obstructed the view of where he was killed.

Q. When you were making this observation did the train move or was it stationary?

A. No, sir, it was moving.

Q. From what point?

A. From a point opposite the house in the direction of where he was killed.

Q. It moved westward then?

A. Yes, sir.

Q. And you saw it moving along that same track?

A. Yes, sir.

Q. And as it was moving on the track your observation was what?

A. That the view was cut off from the place of accident.

Cross-examination.

By Mr. Drysdale:

Q. What do you mean by the point of accident?

[fol. 100] A. The place that he was found when he was killed.

Q. You mean on the rails?

A. Yes, sir.

Q. Now how far to the right of the scene of the accident could you see from the house when the train was passing?

A. When the train was passing Mr. Dunn was up there and he crossed the canal, I don't know what distance he was, the width of the canal, he was on the westward edge of the north side of the canal when the train was passing the point at which he was killed.

Q. The point I am trying to establish is this. I understood you to say that a person standing on the porch could not see what happened at the point of accident while the train was there?

A. That is right.

Q. Supposing the accident had happened between two, three, four, five, ten, twenty, or fifty feet to the right, how far to the right could you have seen?

A. I suppose about 15 or 20 feet.

Q. You suppose?

A. Yes, sir.

Q. Is that supposition the best you can tell us?

A. I didn't measure it.

Q. It may have been seen a couple of feet from the right-hand rail?

A. No, sir, because they had a man standing at the point of the accident and he moved until I could see him and when he came into view he was about 20 feet from the track.

Q. About 20 feet from the track?

A. Yes, sir, he was across the canal on the other edge of the canal.

Q. Did you make that experiment yourself?

A. No, sir.

Q. You didn't make it?

A. No, sir, I was there and witnessed it when they were taking the observations.

Q. Then what you have been telling us is what somebody else told you?

A. No, sir, I saw it myself.

Q. I asked you if you had made the experiment?

A. If you mean it that way, I made the experiment then.

Q. Suppose a man had been immediately over the right-hand rail and had been hit by the cow catcher at that particular point and a person standing on the porch watching, how far would that man [fol. 101] have to have been flung before he could have been seen?

A. About 20 feet.

Q. What was the condition of the place where the man was actually flung? You know the place, I suppose, with respect to weeds, was there a lot of weeds on it, high, tall weeds?

A. I don't know, I didn't go there at all, I did not visit the scene of the accident for two or three months after the accident happened.

Q. Then you don't know anything as to the condition of the place of the accident at the time of the accident?

A. No, sir.

Q. Is your memory good?

A. Tolerably good.

Q. You testified at the last trial, didn't you, that when that train left it had a clear block for 15 miles, didn't you?

A. I don't remember what I testified to but the official distance is 14 miles.

Q. You testified a little while ago it was 17 and then you said it was 19 and then you said 14.

A. I might have been mistaken in calling the distance, but I have actually looked to see what the distance was and it is 14 miles.

Q. If you were so confident of the real facts, how come you to give us two or three different estimates, or not estimates, but positive statements, 19, 17, 14, and the last time you said it was 15.

A. The last time?

Q. That it what my notes show, if you say you didn't say 15 the

last time, I will immediately apologize, but didn't you say it was 15 the last time?

A. Since I have been here this time?

Q. Yes, sir.

A. No, sir.

Q. Now you read the record of the train 1008 going west, that it arrived at Warminster at 6:17 and left at 6:30 and a little while ago you told us it got in at 6:25 and this time when you read from your record it was 6:17, wasn't it?

A. Yes, sir.

Q. What was the state of the weather on that particular morning at 25 minutes to 7 with respect to wind?

A. I don't remember. I didn't have any occasion to be out of doors, I was in the telegraph office with the windows shut down and the doors shut.

Q. You don't know whether there was any wind at that time, or not?

[fol. 102] Q. So, if any of the other witnesses have testified that there was a strong wind blowing you won't undertake to contradict them, will you?

A. No, sir, I wouldn't undertake to contradict them.

Q. Now you left the office at seven o'clock or a few minutes after seven, after you were relieved?

A. Yes, sir.

Q. You work at night and quit at seven o'clock in the morning?

A. Yes, sir.

Q. And there was nothing particularly to call your attention to the weather at that time?

A. No, sir.

Q. What time was it when you were cutting wheat?

A. I commenced—I went down to the field from home and I left the house about 8:30 and arrived there about 10 or 15 minutes later.

Q. Something like a quarter to nine?

A. Yes, sir.

Q. There might have been a strong wind blowing a couple of hours before and it had died down?

A. That might have been possible.

Q. Tarleton Fleming came to see you between 7:45 and 8?

A. Between 7:30 and 7:45.

Q. It might have been half-past seven?

A. Yes, sir.

Q. He traveled how far before he came to your house?

A. About three-quarters of a mile.

Q. From Mrs. Nixon's house?

A. Yes, sir.

Q. That would make it nearly two miles from the scene of the accident, wouldn't it.

A. I don't know how far it is from the Nixon house to the place of the accident.

Q. Now what time was it with reference to the death of Mr. Nixon

that you had this conversation about the cow? I mean how long was it before his death?

A. Some time in the spring before, I don't know. It was a year before he was killed or that year, I know when he moved down there I offered him pasture.

Q. This conversation might have been the year before the accident then?

A. It might have been but it was not. I offered him pasture [fol. 103] twice, when he moved down there and then again when it was time to put the cow in the pasture again. I told him I always had pasture there for him if he wanted to pasture his cow and he told me he would rather keep it at Midway where he could attend to her.

Q. What do you mean by your answer that it might have been the year before but it was not? Cant you tell us the date. You spoke now of two conversations and you told us of the first one, now take the next conversation, how long was that before Mr. Nixon was killed?

A. I don't remember.

Q. Was it more than two months?

A. It might have been two months, it was the same spring he was killed.

Q. Mrs. Nixon has testified for two months before Mr. Nixon was killed the cow was dry and that it gave birth to a calf about two days or three days before he was killed. Can you contradict that?

A. No sir, I cannot.

Witness stands aside.

Mrs. T. J. West sworn for defendant.

Direct examination.

By Mr. Long:

Q. Are you the wife of Mr. West, who has just testified?

A. Yes, sir.

Q. You live near Warminster?

A. Yes, sir.

Q. Were you acquainted with Mrs. Nixon?

A. Yes, sir.

Q. Are you among one of her nearest neighbors?

A. Yes, sir, I was her nearest neighbor.

Q. Do you remember being called to her house by a messenger on the morning of the day when Mr. Nixon was killed?

A. I do.

Q. Do you know who the messenger was?

A. One of the section laborers, I don't remember the man's name, but it was one of the colored men that worked on the section.

Q. About what time of day was that?

A. It was about 7:30.

Q. Did you go in response to that request?

[fol. 104] A. Yes, sir, I went in a few minutes.

Q. Did you see Mrs. Nixon?

A. Yes, sir.

Q. Where did you find her?

A. In the back yard. When I went in the house, I did not see anyone and I went through the house and she was in the back yard.

Q. She was in the back yard when you arrived?

A. Yes, sir.

Q. What was she doing?

A. I don't know, but she was coming on to the back porch and I met her in the back yard and came to the house with her. The colored girl and children were in the house and she was in the back yard and I went to the back yard to her and met her and came on to the house with her.

Q. Did she tell you what had happened?

A. Yes, sir.

Q. What did she say to you?

A. She said, "Oh, Mrs. West, what am I to do, Sam is killed." That is about the first thing she said to me.

Q. Did she give you any account of how he was killed?

A. She said that she saw this train coming or heard it, it was a light train and it was running so fast she thought maybe Sam or Mr. Nixon wouldn't hear the train and she felt uneasy and she said she felt so uneasy she went out in the yard to see if he got off the track. She went further up nearer the stable to see if she could see and be sure he was off the track, but she said he had gotten out of sight and she couldn't see and she came on back in the house and told the girl she hoped he was all right, but she felt uneasy as this train was light and running so fast as he had just left the house.

Q. She told you she went out, having heard the train pass and being anxious about her husband, she went out to see whether——

A. She said she went out to see if she could see him get off the track or if she could see anything of him, she felt uneasy as the train was running so fast and it was a light train and she felt uneasy about Mr. Nixon and went out to see if she could see anything of him and whether he got off the track, or not.

Q. What did she say about seeing him?

A. She said she couldn't see him, he had gotten out of sight and she went in the house and told the girl she hoped he was all right, that she couldn't see anything of him.

[fol. 105] Q. She didn't claim to have seen the accident?

A. She did not to me.

Q. Did she tell you how she had learned about the accident?

A. She said this colored man, one of the section men, came to her and told her. She said, he did not get to Midway to the tool house by seven o'clock and they felt uneasy about him on account of this train and they went on down the track to look for him and found him dead and went right straight to her house and told her about it.

Q. She stated to you that is the way she learned about his death?

A. Yes, sir.

Q. Did you hear that train pass that morning?

A. Yes, sir, I heard and took particular notice because early in the morning we are not in the habit of having a light train, they are usually long freight trains at that time of day and I noticed it because it made a noise like a passenger train and I knew we didn't have a passenger train at that time of day.

Q. But it was making enough noise for you to hear it?

A. Yes, sir.

Q. Did you see it?

A. I couldn't see it very well from my back porch because the trees hid the view.

Q. How far was your house from the train?

A. About a mile.

Q. And you could hear it for about a mile?

A. Yes, sir.

Q. On what side of the track were you?

A. I suppose on the north side.

Q. Were you east or west of the point where the train was passing?

A. I was east—no, I suppose you would call it west. The track goes like that (indicating) and my house is back here and I reckon it is west.

Cross-examination.

By Mr. Drysdale:

Q. How far is your house from Warminster Depot?

A. We call it a mile or a little bit more.

Q. In what direction is it?

[fol. 106] A. It is west from the depot.

Q. It is up towards Gladstone?

A. Yes, sir, up the track.

Q. How far back from the track?

A. It is about a mile from the track. We are about as far from the track as we are from the depot.

Q. When you heard the noise of the train, you said first you were east of it and then you said west of it?

A. I don't know which you would call it.

Q. Was the wind blowing towards you or otherwise, I mean with reference to the train?

A. I don't remember about that, I don't remember whether there was any wind, or not.

Q. When you got to Mrs. Nixon's house what time was that?

A. I think I got to the house about eight o'clock. I got the message about 7:30 and of course I didn't go right that minute but by the time I got there it was about eight o'clock.

Q. Mrs. Nixon was very much agitated, wasn't she?

A. Yes, sir.

Q. Did you make any note at that time of what she said?

A. No, sir.

Q. You didn't make any note of the particulars you have told us of now?

A. No, sir.

Q. When Mrs. Nixon was on the porch she had a much better view of the track and its immediate surroundings than she would have on the ground, which would be some five or six feet higher?

A. It would be higher up, yes, sir.

Q. And therefore going on the ground would decrease her view rather than increase it?

A. I suppose she could see further up the track by going out a little ways.

Q. She didn't go on the track, did she?

A. No, sir.

Q. You know where Mr. Nixon was killed?

A. Yes, sir.

Q. She could see much better standing on the porch than if she had gotten off the porch, couldn't she?

A. I don't know.

Q. Why don't you know?

A. Because I have never taken any particular notice but I think [fol. 107] maybe I would have done the same thing she did, I think I would have done the same thing she did, thinking I would have gotten a better view.

Q. You possibly would have gone all the way?

A. I don't know.

Q. She said to you "what am I to do, Sam is killed," she was wringing her hands and didn't know what she was doing, did she?

A. She was grieving very much.

Q. Her husband had just been killed and he was a good husband, I believe you can testify to that?

Q. Your husband is agent or telegraph operator for the Chesapeake & Ohio Railway Company at Warminster?

A. Yes, sir.

Witness stands aside.

William H. Venable (col'd) sworn for defendant.

Direct examination.

By Mr. Long:

Q. What is your name?

A. William H. Venable.

Q. Where do you live?

A. Down at Midway, Nelson County.

Q. What is your employment?

A. I work on the section.

Q. For the Chesapeake & Ohio Railway Company?

A. Yes, sir.

Q. What position have you with the railroad company?
A. I am a track walker.
Q. Between what points?
A. From Wingina to below Warminster.
Q. How long a distance is that?
A. Six miles.
Q. It is your business to walk the track and observe it and repair anything that is wrong with the track for that distance of six miles from Warminster to Wingina?
A. Yes, sir, a little the other side of Wingina.
Q. How often do you go over it?
A. Every morning.
[fol. 108] Q. Is that the same section of track that was under the care of Mr. Nixon?
A. Yes, sir, the same section.
Q. Did you work with him or under him?
A. Yes, sir.
Q. Was he your foreman?
A. Yes, sir.
Q. What time did you go on duty in the morning?
A. Seven o'clock.
Q. At what point were you expected to begin your work?
A. At the tool house at Midway.
Q. Do you know what Mr. Nixon's custom was in respect to being at that point every morning?
A. Yes, sir, he used to ride the little car that he used every morning, and he would leave time enough to get up there in the morning to do his own work, milk his cow and then go on duty about seven o'clock.
Q. About what time did he generally get up there according to your recollection?
A. I reckon it was along about 15 minutes or 20 minutes or 15 minutes.
Q. Before what?
A. Before seven o'clock.
Q. He got up there 15 or 20 minutes before the hour he was to go to work?
A. Yes, sir, depending on what time he started, it took him about ten minutes to ride up there.
Q. Have you ever tested that on the velocipede yourself?
A. Yes, sir.
Q. It takes about ten minutes to make the distance from the Nixon house to the tool house?
A. Yes, sir.
Q. And you say his habit was to arrive there about 15 or 20 minutes before seven?
A. Yes, sir.
Q. Why did he come there before time?
A. Because he had to milk the cow before he went on duty.
Q. Whose cow was it?

A. His cow.
Q. Where was the cow kept?
A. In Mr. Dunn's pasture.

[fol. 109] By Mr. Drysdale: Of course it is understood that I except to all of this testimony.
By the Court: Yes, sir.

By Mr. Long:

Q. Do you know whether he was milking that cow at the time or about the time of the accident?
A. Yes, sir.
Q. Something has been said about the cow being fresh and not being milked at that particular time. Do you know anything about that?
A. She was fresh at that time and he was milking her at that time
Q. She was fresh and being milked at that time?
A. Yes, sir.
Q. Now, on the morning of the accident when seven o'clock arrived and Mr. Nixon was not there were all the section hands there?
A. Yes, sir, all of use was there.
Q. Can you give the names of them?
A. Alex Woodson, John Rose, William Shipman, Johnny Rose, Tarleton Fleming and myself.
Q. You were all on hand ready to begin work?
A. Yes, sir.
Q. And he did not appear?
A. No, sir, he didn't.
Q. What did you men do?
A. At two minutes after seven o'clock we set the car on the track and moved on down towards where he lived and in going on down we found a little piece of a tool that came off the velocipede and I jumped down and picked it up and the other boys couldn't exactly recognize it but I was pretty well acquainted with it. I had been running it a long time and knowed where it came from, and then after moving on a little ways we found another piece of the oil box that sets in the little car, what he carried the can of oil in and then we moved on a little bit further until we came to a little wheel of the car and I got off, and we throwed that off the track and we continued to go until we came to where Mr. Nixon was.
Q. Now Williams, as the hand car moved on down the track were you on it as you approached Mr. Nixon's body or were you walking?
[fol. 110] A. I was walking.
Q. Before the car or behind it?
A. I was behind it.
Q. Where were the other men?
A. Me and William Shipman, I think, were on the ground.
Q. And the other four men were pulling the car?
A. Yes, sir.

Q. Keeping along with you and William Shipman as you walked along on the ground?

A. Yes, sir.

Q. Who found the body?

A. I think it was William Shipman, as well as I can remember.

Q. He was walking ahead of the car?

A. I think he might have been a little bit ahead, yes, sir.

Q. How far was the body from the track and on which side of the track was it?

A. It was on the north side of the track.

Q. Towards the old canal bed?

A. Yes, sir.

Q. And how far from the rail?

A. It was about ten feet, as near as I can get at it.

Q. Lying on the embankment, or was there any slope there?

A. Yes, sir, down the slope.

Q. When you reached him there was no life remaining in his body, was there?

A. No, sir.

Q. After you found the body what did you do?

A. William Shipman and the rest of them went on down to notify Mrs. Nixon and I and Johnny Rose stayed with the body.

Q. You didn't go to Mrs. Nixon's house then?

A. No, sir.

Q. But you remained there with the body?

A. Yes, sir.

Q. How long did you stay with the body?

A. Until it was taken up.

Q. And carried down to the house?

A. Yes, sir.

Q. Did you find anything about the body, anything besides the body there that had been carried on the bicycle or tricycle?

A. Yes, sir, his dinner bucket and he had his milk pail and bran bucket.

[fol. 111] Q. Dinner bucket, milk pail and bran bucket?

A. Yes, sir.

Q. Did you recognize them as his buckets?

A. Yes, sir, certainly.

Q. What opportunity had you had to know them?

A. I had been carrying them down of a morning, pretty often every morning when he milked I carried the milk down to the house when I passed by there in the morning.

Q. After the foreman got to work with his gang on the hand car what were your duties?

A. To look after the track and put on broken angle bars and different works.

Q. Did you use the tricycle in going over the track?

A. Yes, sir, I used it, certainly.

Q. After Mr. Nixon took control of the gang or section men using the hand car, what did he do with the tricycle?

A. I used the tricycle.
Q. You used that?
A. Yes, sir.
Q. When you took the milk down to Mrs. Nixon, how did you do it?
A. Sometimes I would take it to the house and sometimes someone would get it or Mrs. Nixon would get it.
Q. Did you carry it on the velocipede?
A. Yes, sir.
Q. Did you go directly to her house or did you go first to Wingina and then come back?
A. First I went to Wingina.
Q. And then came back and did you get the milk on your return?
A. Yes, sir.
Q. Where did you get it from?
A. He would leave it setting in the tool house until I returned back.
Q. Then you would go in there and get the milk and carry it on down to Mrs. Nixon?
A. Yes, sir.
Q. Had you done that frequently?
A. Certainly I have.
Q. Was it a daily occurrence?
A. Yes, sir, unless he was working up there and carried it along himself.
[fol. 112] Q. Did Mrs. Nixon ever come there and milk the cow as far as you know, in the morning?
A. No, sir, not as far as I know of.
Q. Who else ever milked that cow besides Mr. Nixon, if anybody else did it?
A. I have milked the cow for him.
Q. You sometimes did it?
A. Yes, sir.
Q. When you delivered the milk at the Nixon house to whom did you give it?
A. Sometimes to the girl who was cooking there, sometimes she would get it and sometimes I would carry it and set it on the porch, depending on what they were doing, or whether they were out, or not. It wasn't many steps across there no way.
Q. When you went back with the milk did you carry the bran bucket back with you generally?
A. No, sir.
Q. You took the milk *mail* with the milk, of course?
A. Yes, sir.
Q. Did you find any bran on the track where the accident occurred?
A. Yes, sir, there was some bran there.
Q. Did you make any use of the bran bucket that morning after the accident?
A. Yes, sir, I got some water in it to wash his face.

Q. Had the bran bucket been mashed or broken?
A. Yes, sir, it was bent up some, right smart.
Q. You say you remained there at the scene of the accident until the body was removed?
A. Yes, sir.
Q. And where did you go with the body?
A. We taken it down to the house.
Q. You went down there too?
A. Yes, sir.
Q. You did not see or have any conversation with Mrs. Nixon at all, did you, that morning?
A. No, sir.
Q. Did you find that morning, just after the accident, all of the buckets that you have mentioned?
A. Yes, sir, the three buckets.
Q. Did you find them all that morning?
A. Yes, sir—no, sir, we didn't, I beg your pardon, we found them when we cut the bushes on the right of way in August.
[fol. 113] Q. Which buckets did you find?
A. The bran bucket and the dinner bucket.
Q. When did you find them?
A. In August, when we cut the bushes.
Q. Have you those buckets here now?
A. Yes, sir, they are here.
Q. Can you produce them before the jury and identify them?

(Witness does so.)

Q. Pick them up and tell the jury what that one was?
A. That was the dinner bucket.
Q. You found that just after the accident?
A. Yes, sir, that was down there.
Q. What did you do with it?
A. We didn't touch that.
Q. You left it in the weeds there?
A. Yes, sir.
Q. Now what is that?
A. That was the milk pail.
Q. You say you did not find that until the following August?
A. No, sir, we didn't, not until we cut the bushes.
Q. Have you the other bucket there too?
A. No, sir.
Q. You only have two?
A. Yes, sir.
Q. You never found the other bucket?
A. We got some water to wash his face and left it on the track and I don't know what became of it.
Q. You found the bran bucket the morning of the accident?
A. Yes, sir.
Q. And you made use of it and you don't know what became of it?

A. Yes, sir, we went to get some water to wash his face and I don't know what become of it.

Q. When did you first get these buckets so as to bring them here?

A. I don't know exactly how long it was.

Q. You didn't have them at the last trial, last October, did you?

A. No, sir.

Q. They were on the side of the bank?

A. Yes, sir.

Q. You went there and found them after the last trial?

[fol. 114] A. Yes, sir.

Q. And you identify them as the same buckets?

A. Yes, sir.

Q. At whose suggestion did you go and get the water in the bran bucket?

A. It wasn't no one's suggestion, no more than I think somebody spoke about washing his face before we taken him to the house and that was the closest thing I seen to get water in and I taken it over to the creek and got the water in that.

Q. How long did the body remain at that point?

A. I don't really know what time it was.

Q. Two or three hours?

A. I reckon so, but I didn't take no notice of that.

Q. But you remained with it until it was removed?

A. Yes, sir.

Q. Did you cover the body in any way during that time when you were there?

A. Me and Mrs. Desper got an umbrella.

Q. Who brought the umbrella there?

A. I think Miss Eva brought it there.

Q. And put it over his face?

A. Yes, sir, we bent down some weeds and sot it over his face to keep the sun out of it.

Q. Was there enough wind stirring at that time to displace the umbrella?

A. No, sir, it was perfectly still.

Q. Afterwards, when you moved the body on the hand car did you cover it then with an umbrella, or not?

A. On the car?

Q. Yes, did you put anything over the body to protect it?

A. I don't know now.

Q. You don't know whether you used the umbrella, or not?

A. No, sir, I don't.

Q. It has been stated here that while a number of people were down there a test was made to see how long it would take to go from the Nixon house to the scene of the accident, or rather to the tool huse on the velocipede. Did you mak- that test?

A. Yes, sir, it takes ten minutes.

Q. Was anybody on the velocipede with you?

A. Mr. Dunn—no, Mr. Geyer was on there.

Q. Mr. Geyer or Mr. Dunn?

A. It was Mr. Geyer, I think, as well as I can remember.
[fol. 115] Q. One or the other of them was on the velocipede?
A. Yes, sir.
Q. And with this passenger you were able to make the distance in ten minutes?
A. Yes, sir
Q. Were you present when that train passed that morning?
A. No, sir, I was not
Q. You didn't see the train, did you?
A. No, sir, I did not.
Q. Did you hear it pass?
A. Yes, sir, I heard it and I heard the train blow somewhere but where it was I couldn't say.

Cross-examination.

By Mr. Drysdale:

Q. You testified the last time that you heard it blow way down east, didn't you?
A. Certainly it was down the road from where I was.
Q. Where were you?
A. I was coming to work.
Q. Where was that; anywhere near the tool house?
A. Coming to the tool house.
Q. From what direction?
A. The direction I come?
Q. Yes.
A. I came the nearest way.
Q. I want the jury to know about that, was it beyond Midway in the direction of Gladstone?
A. Yes, sir, I was beyond Midway, I was coming down the Midway road.
Q. You heard it blow somewhere, a pretty faint blow as if it was several miles down the line?
A. I really don't know how far it was.
Q. You are an experienced railroad man and you can give some idea from the sound of the whistle how far it is away?
A. No, sir, I don't know how far exactly it was, but I heard it blow somewhere.
Q. Where did Mrs. Desper get this umbrella, do you know?
A. No, sir, I don't know.
[fol. 116] Q. Let us look at those cans. You say you can recognize them. Now at the last trial of this case, which was about the beginning of last October you told about the cans but you didn't have them here.
A. No, sir, we didn't have them here, they didn't give no orders to bring them.
Q. What can is this?
A. The dinner bucket.
Q. That is the dinner bucket that Mr. Nixon always carried?

A. Yes, sir.
Q. Where is the lid to it?
A. I don't know.
Q. When was this picked up and where?
A. It was picked up right where he was killed at.
Q. When?
A. I don't know how long it has been.
Q. Since last April?
A. Yes, sir.
Q. How do you know that is his dinner bucket?
A. I have seen it often enough to know it.
Q. Is that anything like it was when he was carrying it?
A. No, sir because it is bent up now.
Q. When he was carrying it it was in good shape?
A. Yes, sir.
Q. Those buckets are made by the score or hundreds and how can you tell that is the particular one he carried?
A. That certainly is his bucket.
Q. How can you tell?
A. It is the same bucket, boss.
Q. Of course that is your opinion, but why and how do you know that?
A. I got that bucket in the same spot where he was killed and that was the same bucket. Of course we could have got the bucket the first time if they had required it.
Q. Tell the jury how you know that is his bucket. I have no doubt you think so, you think it is the bucket that Mr. Nixon carried because it was found near where he was killed.
A. I have handled it often enough to know it.
Q. Tell the jury if there is some mark on it by which you can identify it?
A. I didn't mark it.
Q. There is a watch, could you tell that watch from any other make. That is a Hamilton watch, could you tell that from any [fol. 117] other watch of the same kind? I have carried it for years and I cannot tell, can you?
A. No, sir, that is his bucket, though, boss.
Q. That is the best you can give us William?
A. Yes, sir.
Q. Now what is this bucket?
A. That was the milk pail.
Q. How can you tell that was his milk pail?
A. Because I have milked in it many and many a time.
Q. What mark is on that?
A. No mark at all.
Q. Is that the only pail of its kind that was ever made?
A. No, sir.
Q. Hundreds of them are made?
A. Yes, sir.
Q. And *you* can you tell this one?
A. It was right there where he was killed.

Q. He was killed in June, 1921, and this was picked up 12 months afterwards?

A. Yes, sir, it certainly laid there.

Q. Tell us why you said you found three buckets at that particular time and then told us later on you did not?

A. We did find three but we didn't find the others until we cut the bushes.

Q. Didn't you try to make this jury believe that you found those buckets there the morning he was killed?

A. I don't think I did.

Q. Did you explain to the jury that you only found two at that particular time until Mr. Long called your attention to the fact and he knew and I knew that you had only found two, if you found any, why didn't you come straight across and say we didn't find three buckets at that time.

A. I stated we found two.

Q. You stated you found three?

A. I did, but I told him I begged your pardon, I was mistaken.

Q. Yes, after he drew your attention to it. Did you see any bucket there that morning?

A. I seen the dinner bucket and the bran bucket.

Q. Why didn't you pick them up?

A. I didn't think they had any use in the world for them.

Q. Were they banged up then like they are now?

A. Yes, sir.

[fol. 118] Q. And rusty like they are now?

A. No, sir, they couldn't have been rusty then because he used them.

Q. Were they on the track or on the side of the track or where were they?

A. This here bucket was on the side of the bank.

Q. Which one?

A. This little bucket. I didn't see this other one, not until we cut the bushes, but the bran bucket I got water in that to wash his face.

Q. You never saw that bucket until you went and made a search after the last trial. Is that true?

A. No, sir, we cut the bushes in August, and we found that and we left it lay there.

Q. Why did Mr. Nixon carry any bran for his cow, didn't he keep feed at Midway?

A. Not at that time he didn't.

Q. Did he at any time keep stuff there?

A. He did when he used to live up there.

Q. Now Mr. Nixon or Mrs. Nixon always bought cow feed in Midway because the cow was right there, wasn't it?

A. Yes, sir.

Q. Why would he carry that bran home and then carry it back to feed the cow? Can you explain that to the jury?

A. No, sir, because I don't know where he bought the bran at.

Q. How much bran was in that bucket?

A. He carried enough for night and morning.

Q. For two feeds?
A. Yes, sir.
Q. How much would that be?
A. I couldn't say, I didn't measure it.
Q. You know he had this garage in which he kept the feed and why should he have to carry that down every morning when he bought it at Midway?
A. I don't know where he bought it at, I really couldn't tell you.
Q. You seem to be able to tell everything else about the cow.
A. I have carried the bran myself many and many a time.
Q. From where?
A. From his house to the tool house.
Q. For the purpose of feeding the cow?
A. Yes, sir.
[fol. 119] Q. Why didn't you carry it that time?
A. Sometimes he brought enough and sometimes he didn't.
Q. If he didn't bring enough you went and got some more?
A. I came by there in the evening.
Q. At the time of Mr. Nixon's death you say the cow was fresh?
A. Yes, sir.
Q. How long had she been fresh?
A. I don't know, I couldn't tell you to save my life.
Q. A cow is fresh after it has a calf; how old was the calf?
A. I don't know how old it was.
Q. Was it six months old?
A. No, sir, I reckon not.
Q. Was it three months old?
A. I don't know exactly how old the calf was.
Q. You cannot tell the jury whether it was three months old or three days old?
A. No, sir, I couldn't tell you exactly how old it was, but I know the cow was fresh, but how old the calf was, I couldn't tell you.
Q. Was the calf running with the cow at that time?
A. No, sir, I don't think it was.
Q. Where was the cow?
A. The cow was in the pasture.
Q. Where was the calf?
A. That was in a little pen right by the station, where he used to live.
Q. It didn't run with the cow?
A. No, sir.
Q. Mrs. Nixon testified that on Sunday before Mr. Nixon was killed on Tuesday that the cow had a calf and that the calf was running with the cow at that particular time. Will you contradict her about that?
A. According to my memory I am telling you the straight thing.
Q. Maybe your memory is a thing to forget with.
A. Any person forgets sometimes, but I don't think I forget that.
Q. All you can tell this jury is the cow was fresh and you cannot tell how old the calf was?
A. No, sir.

Q. And you say the calf was in a pen?
A. Yes, sir, he had a pen there for the calf.
Q. And you saw the calf in the pen?
[fol. 120] A. Certainly I did.
Q. Then tell the jury how old it was? You know whether it was two days or two weeks or two months old?
A. I couldn't tell you.
Q. How much do you know about a cow, you can tell the difference between a two day old and a two months old one, can't you?
A. Yes, sir.
Q. Was this calf two days or two months old?
A. I couldn't tell you.
Q. I mean at the time Mr. Nixon was killed?
A. Yes, sir.
Q. When did you say you found the milk pail?
A. In August.
Q. Didn't you tell us a minute ago that you found it at the time of the accident?
A. No, sir, I told them I was mistaken, we found the bran bucket and dinner bucket.
Q. You said in answer to Mr. Long that you found the milk pail in August—when did you find it, at the time of the accident or in August?
A. I found it in August.
Q. Why did you tell us then that you found it at the time of the accident?
A. I just slipped my memory just a little bit.
Q. You did not purposely mislead us about that, your memory just slipped a cog and you made a mistake?
A. Yes, sir.

By Mr. Long: I do not think the witness has said anything which justifies this sort of an examination and I object to it.
By Mr. Drysdale: Frankly, I think the witness is fabricating. That is my opinion.
By the Court: I think he has a right to test him along that line.

By Mr. Drysdale:

Q. You told us you found all three of the buckets together and now you found them at different times. All right, we will let it go [fol. 121] at that. Now you said it was Mr. Nixon's habit to get to the tool house about fifteen or twenty minutes before seven?
A. Something along there.
Q. It was the habit of most of you to get there a few minutes before time to go to work?
A. Yes, sir.
Q. And you got there sometimes fifteen or twenty minutes before seven?
A. Certainly, yes, sir.
Q. In fact, practically all of you did, didn't you?
A. Yes, sir.

Q. And it was Mr. Nixon's habit to get everything together before you started out to work and you generally had to come some distance before you started to work?

A. Every man did.

Q. You know whether or not it was the custom of Mr. Nixon to get his men together and his tools and whatever material he needed, to get that ready by seven o'clock to start out to work by seven?

A. He didn't have to get any material together, that was always on the car.

Q. He might have had something to carry out?

A. No, sir.

Q. If you are going to start out on a new job?

A. If we were starting out on a new job certainly we would have to move it.

Q. Now you made that run from Mr. Nixon's house down to the tool house in ten minutes?

A. Yes, sir.

Q. And who did you have on the car with you?

A. Either Mr. Dunn or Mr. Geyer, I don't know which.

Q. You know the two gentlemen apart, don't you?

A. Yes, sir, but it just slipped my memory just a little bit.

Q. You have seen them both this morning. Can't you recollect which it was?

A. Was it you, Mr. Dunn?

Q. Never mind about that, can't you recollect which one it was?

A. I don't know which it was, it was one or the other.

Q. You told us positively at first it was Mr. Geyer?

A. I did say that at first but I changed it. I said one or the other.

Q. After Mr. Long made the suggestion to you?

[fol. 122] By Mr. Long: I did not make any suggestion to him at all.

By Mr. Drysdale: You asked him whether it was Mr. Geyer or Mr. Dunn.

By Mr. Long: And his first reply was that it was Mr. Geyer.

By Mr. Drysdale: Very well, the jury will remember about that.

Q. Now are you quite sure about which it was?

A. No, sir, but it was one or the other.

Q. What was the idea of carrying a gentleman with you anyhow?

A. He was down there and I had to bring him up.

Q. You knew you were making this run and that the other gentleman was timing you, didn't you?

A. No, sir, I didn't know that. I know that because I have run it a thousand times.

Q. You testified at the last trial that it would take about ten minutes except when there was a strong wind against you and then it would take longer?

A. Yes, sir.

Q. It takes considerable strength to propel that machine?

A. Not so much but it wasn't made to run so over-fast because you couldn't see what is broke or anything on the track.

Q. That machine was made for the purpose you used it, for going over the track slowly to discover defects?

A. Yes, sir.

Q. How fast could it go if a man was going as fast as he could?

A. I don't know.

Q. Suppose Mr. Nixon was on the track that particular morning and a strong wind was blowing, that would necessarily make him go slower, wouldn't it?

A. Yes, sir.

Q. And it would have an effect on his riveting his attention on what he was doing?

A. I don't know, I reckon it would.

Q. What time did you say you started from the tool house that particular morning to go to Mr. Nixon's house?

[fol. 123] A. Two minutes after seven.

Q. Why didn't you wait a few minutes longer to see if Mr. Nixon would come?

A. That is the hour to go to work and we had stayed two minutes over then.

Q. Did you go to the cow pasture to see if Mr. Nixon was there?

A. No, sir.

Q. Why didn't you?

A. We could see into the cow pasture, or the best portion of it.

Q. The place where the cow was milked was hid from the tool house, wasn't it?

A. Not so you couldn't see.

Q. Anyway, you didn't go there to see whether Mr. Nixon was there, or not?

A. No, sir, because I was there and he didn't come and the car wasn't there.

Q. If Mr. Nixon was in the habit of going there to milk his cow every morning it seems to me that would be the most natural place for you men to look for him; anyway, you did not?

A. No, sir, we did not.

By Mr. Long:

Q. William, you were a witness on the former trial of this case, weren't you?

A. The other trial?

Q. Yes?

A. Yes, sir.

Q. Who summoned you as a witness?

A. Mrs. Nixon summoned me.

Q. The plaintiff summoned you as a witness?

A. Yes, sir.

Q. Did she summon you this time?

A. No, sir, she did not.

By Mr. Drysdale:

Q. Were you summoned by the company as well?
A. Yes, sir.
Q. Why didn't you tell the jury that. Mr. Long asked you who you were summoned by and you said Mrs. Nixon, why didn't you tell they you were summoned by the company as well?
[fol. 124] A. I reckon he knew I was summoned by the company.
Q. Yes, but I wanted the jury to know. You can stand aside.

Witness stands aside.

OTTIE BRANCH sworn for defendant.

Direct examination.

By Mr. Long:

Q. Where do you live?
A. Midway Mills.
Q. What is your occupation?
A. Farming.
Q. How near do you live to the tool house on the Chesapeake & Ohio Railway where Mr. Nixon's force was in the habit of assembling?
A. About fifty yards I reckon.
Q. In the course of your business as a farmer did Mr. Nixon come under your observation in the morning after he came up there to the tool house?
A. Every morning.
Q. Did you see him every morning?
A. Every morning.
Q. How nearby?
A. I would say just across the county road.
Q. And what was he doing?
A. Milking.
Q. Where did he keep his cow?
A. In Mr. Dunn's pasture.
Q. What were you, yourself doing at that time?
A. I was feeding.
Q. At your stable?
A. Yes, sir.
Q. And where was that situated with reference to the Dunn pasture? Was it in the pasture or across the road, I mean your stable?
A. That was across the road from the pasture.
Q. How near was it to the place where Mr. Nixon milked his cow?
A. Just across the road.
Q. Do you know whether Mr. Nixon was milking that cow up to the time or about the time when the accident occurred?

[fol. 125] A. Yes, sir, he was milking her up to the time that the accident happened?

Q. When was the last time you saw him milking the cow?

A. I seen him milking her the day before the accident happened.

Q. In the evening or morning?

A. In the evening.

Q. The evening before the accident happened he milked that cow in your presence and you saw him?

A. Yes, sir.

Q. Did you know whether that cow was fresh at that time, or not?

A. Yes, sir, the cow was fresh.

Q. Where was the calf kept?

A. It was kept in Mr. Dunn's pasture.

Q Running with the cow or penned up?

A. The calf was in the pen.

Q. Do you know how old the calf was at the time of the accident?

A. It was about three weeks old, I think.

Q. Mrs. Nixon testified here this morning that that calf was born on Sunday and that Mr. Nixon was killed on the following Tuesday, two days later. Is that true?

A. The calf was about three weeks old when he was killed.

Q. And Mr. Nixon had been in the habit of milking that cow?

A. Yes, sir.

Q. How did he divide the milk, do you know?

A. He gave the calf half, or that is what he told me.

Q. You saw him milk the cow and you spoke to him also about it?

A. Yes, sir.

Q. And the calf was three weeks old at the time instead of two days?

A. Yes, sir.

Q. Did you ever see anybody else milk that cow?

A. I have seen Bill Venable milk her, the track walker.

Q. Do you know where Mr. Nixon kept the feed for his cow?

A. I don't know where he kept the feed.

Q. Some reference has been made here to a garage located nearby that he at one time occupied. Was he occupying that garage or using it at that time?

[fol. 126] A. No, sir.

Q. Where was that garage situated?

A That was at Midway.

Q. In the Dunn field or where?

A. No, sir, just across from the pasture.

Q. And he was not using it?

A. No, sir.

Q. Who was using it?

A. Mrs. Robertson was using it at that time.

Q. How was she using it, as a garage?

A. Yes, sir. she had her car in it.

Q. You did not see anything of the accident, did you?

A. No, sir.

Q. Did you see the train as it passed by that morning?
A. I didn't see it, but I heard it from the house.
Q. You didn't go down to the scene of the accident after Mr. Nixon was killed, did you?
A. No, sir.
Q. Do you know where Mr. Nixon got his feed from?
A. I don't know where he got the feed from but I have seen him bringing it up to the pen where he milked from the depot, but I don't know where he got it from.
Q. How did he carry it?
A. In a bucket.
Q. Coming from the direction of the tool house?
A. Yes, sir.
Q. You saw him bringing the feed in a bucket.
A. Yes, sir.
Q. Was that his habit every morning?
A. Yes, sir, he always brought it, morning and night.
Q. What time did he milk the cow?
A. In the morning?
Q. Yes, sir.
A. About 6:30.
Q. Before he went to work in the morning?
A. Yes, sir.
Q. Do you know what disposition he made of the milk in the morning after he had milked the cow?
A. I don't know what he done with the milk after he milked, but I would see him go down to the depot with it.
Q. What do you mean by the depot, do you mean the tool house?
[fol. 127] A. I mean the tool house.
Q. Do you know who carried that milk down to the Nixon house?
A. No, sir, I don't know who carried it down there.

Cross-examination.

By Mr. Drysdale:

Q. Mr. Branch, the depot is further away from Mr. Nixon's house than the tool house, isn't it?
A. Yes, sir.
Q. Then when you saw Mr. Nixon bringing the feed from the depot he had evidently carried it pass the tool house and was bringing it back again, if he came from the house?
A. I have seen him come across the bridge with it.
Q. I want this jury to understand how far east of the depot at Midway was the tool house?
(No answer.)
Q. I am asking you, sir, how far east of the depot at Midway is the tool house?
A. About ten yards I reckon.
Q. No more.
A. Ten or fifteen I reckon.

Q. No more than fifteen yards? How far is it from the tool house to Mr. Nixon's house?

A. It is about a mile I reckon.

Q. Then if you saw him bringing feed from the direction of the depot he had evidently got it down town, hadn't he?

A. I don't know where he got it from.

Q. You never saw Mr. Nixon milk that cow?

A. I have seen Mrs. Nixon, before she moved away from Midway Mills, do so, but I never have seen her milk the cow after she moved down to the other place.

Q. You never saw her milk the cow after she moved away from Midway Mills?

A. No, sir.

Q. When did Mr. Nixon tell you he gave the calf half of the milk and kept half of it?

A. I don't know what month it was in.

Q. How long was that before he was killed?

A. It wasn't long before he was killed.

Q. Was it a week or a month or two months, or what was it?

[fol. 128] A. It was about a week I reckon.

Q. It wasn't any more than a week?

A. No, sir.

Q. How did that conversation come up?

A. I would go out there when I got done feeding and talk with him a while when he was milking.

Q. Mrs. Nixon said this calf was born on Sunday, her husband being killed on Tuesday. When did you say it was born?

A. I don't know when it was born.

Q. Where was it born?

A. In Mr. Dunn's pasture.

Q. Don't you know the day of the week?

A. No, sir.

Q. Don't you know how many days it was before Mr. Nixon was killed?

(No answer.)

Q. What did you tell us at the last trial—you testified at the last trial—what did you tell us at the last trial with respect to the age of the calf?

A. That it was about three weeks old, I think.

Q. Did you tell us that?

A. I think so.

Q. As a matter of fact, isn't it true that you never said one word about the age of the calf at that particular time. Isn't it true at the last trial you didn't say one word with respect to the age of the calf? Isn't that true?

A. I don't remember now.

Q. Now if you don't know, you say you don't know where Mr. Nixon kept the feed for the cow, how do you know he didn't keep it in that garage?

A. He didn't keep it in there.

Q. How do you know that?

A. I had one key to it.
Q. How frequently did you go in it?
A. I would go in there sometimes.
Q. How many times a day or week or month?
A. I would go in there about twice a week.
Q. For what purpose?
A. I would go in there to get the car out.
Q. Get whose car out?
A. Mrs. Robertson's.
Q. Did you work for her?
[fol. 129] A. Yes, sir.
Q. Then you are not farming in your own right, you are simply working for Mrs. Robertson?
A. No, sir, I farm.
Q. And you can work for Mrs. Robertson at the same time?
A. I work for her by the day.
Q. When you went in there to get the car out wasn't there any boxes or barrels with some feed that might have been kept in them?
A. No, sir, there wasn't anything in their but a gasoline tank.
Q. You are quite sure of that?
A. Yes, sir.
Q. And you cannot tell us how many days before Mr. Nixon was killed that cow was fresh?
A. No, sir, I couldn't tell you exactly.
Q. Wasn't it Mr. Nixon's invariable habit when he had a calf there to let the calf run with the cow for some times?
A. No, sir he kept the calf in the pen.
Q. For how many days before the accident had this cow been milked—as a matter of fact the milk of a cow isn't good for some days after it becomes fresh, is it?
A. It is not good for nine days.
Q. Was it nine or ten days before the accident that this calf was born. Will you swear to that?
A. Yes, sir.
Q. How many days older than nine or ten days was it? Didn't you try to lead this jury to believe that Mr. Nixon had been milking that cow for some considerable time and right up to the date of the accident?
A. Yes, sir.
Q. That is what you tried to make them believe, all right, you can stand aside.

Witness stands aside.

J. L. Rose (col'd) sworn for defendant.

Direct examination.

By Mr. Long:

Q. Your name is J. L. Rose?
A. Yes, sir.

[fol. 130] Q. You are a son of John Rose?
A. Yes, sir.
Q. Is your name also John?
A. No, sir, my father's name is John and my name is Johnny.
Q. In whose employment are you?
A. The Cheaspeake & Ohio Railway Company?
Q. How long have you been employed by the company?
A. I guess I have been employed off and on since 1911.
Q. You have been in the employment of that company, off and on, for about twelve years?
A. Yes, sir, off and on.
Q. In what capacity are you employed, what do you do?
A. Section laborer.
Q. Who was your foreman, was Mr. Nixon your foreman?
A. Yes, sir.
Q. You were working on the section under him?
A. Yes, sir.
Q. Did you report at the tool house near Midway on the morning of June 21, 1921, when he was killed?
A. Yes, sir, I was there.
Q. Did all of the others of his force report there that morning?
A. No, sir, there wasn't but two got there when the train passed. that is me and my father.
Q. What time did you come there?
A. I don't know exactly, but I was a little behind my father.
Q. Were you there when the train passed?
A. Yes, sir.
Q. Did you see the train coming?
A. Yes, sir, I saw it.
Q. You didn't see the accident, did you?
A. No, sir.
Q. You didn't see him on the track either in front of the train?
A. No, sir.
Q. But you saw the train pass?
A. Yes, sir.
Q. At what hour did you go on duty?
A. We were supposed to start at seven o'clock.
Q. By seven o'clock had the whole force reported there except Mr. Nixon?
A. Yes, sir.
Q. When he did not appear what was done by the men who were there?
[fol. 131] A. We stayed there until two minutes after seven by our time, and then we put on the car and went to hunt for him and we found some part of the car broke up along the track and then we came to him.
Q. You first found some parts of the car broke up?
A. Yes, sir.
Q. And then you found his body?
A. Yes, sir.

Q. What was the position of his body and where was it?
A. It was laying on the edge of the bank.
Q. On the side of the bank away from the river?
A. No, sir, he was on the north side, on the right-hand side com-
g west.
Q. That would be the side away from the river then?
A. Yes, sir.
Q. And how far was he lying from the north rail of the track?
A. It wasn't over seven or eight feet, or something like that, maybe
little bit over.
Q. Was there a pathway alongside of the track at that point?
A. I don't understand you.
Q. Is there a walkway along there on the side of the track?
A. Yes, sir, kind of a tow path.
Q. Was he beyond that?
A. Yes, sir, he was on the edge of the tow path kinda in the
weeds and you couldn't hardly see him.
Q. Who was it that found him?
A. William Shipman, he was the first one that found him.
Q. Was he on the car or walking?
A. Walking.
Q. Ahead of the car?
A. Kinda on the side of the car.
Q. Did you see any buckets about there?
A. Yes, sir.
Q. What buckets did you see?
A. We found the milk bucket there and his dinner bucket.
Q. The milk bucket and the dinner bucket?
A. Yes, sir.
Q. You found two buckets?
A. Yes, sir.
Q. Did you ever find any more afterwards?
A. Yes, sir, I think along some time in July or August, when we
out the right of way the other one was found.
[fol. 132] Q. Did you handle the buckets at all?
A. No, sir.
Q. Have you seen them since?
A. Yes, sir.
Q. Are those the buckets over there?
A. Yes, sir, these are the buckets, here, yes, sir, these are the
ones.
Q. Do you know which one it was you found in August?
A. It was this here bucket, I think.
Q. Which one is that?
A. The dinner bucket.
Q. Did you find that then or in August?
A. I think this is the bucket we found in August.
Q. You think you found that in August?
A. Yes, sir, the other bucket was a kind of a common tin bucket.
Q. Was it a larger bucket?

A. Between this one and this one.

Q. That was the third bucket?

A. Yes, sir, I cannot tell you exactly the size of them.

Q. Did you know the uses that he put these various buckets to, or could you tell about that?

A. One was the dinner bucket, and one was a bran bucket, and another was a milk bucket.

Q. Did he have a bucket that he used for carrying the bran in?

A. Yes, sir.

Q. Did he generally have that bucket with him in the morning?

A. Yes, sir, he generally did.

Q. And one of the buckets you did not find at the time?

A. No, sir.

Q. When the men found the body what did they do with it?

A. Myself and William Venable, we stayed with the body and the other four went down to Warminster to report.

Q. Were they going to see Mrs. Nixon too?

A. Yes, sir, I think one of them told Mrs. Nixon about it.

Q. You didn't go down there yourself?

A. No, sir.

Q. Did you stay with the body until it was moved?

A. Yes, sir.

Q. Was the body protected in any way from the sun during that time?

A. No, sir, no more than somebody had put an umbrella over it. [fol. 133] Q. Did you ever see Mr. Nixon there before the hour to go to work in the morning milking the cow?

A. Yes, sir, he generally came there every morning to milk the cow before seven o'clock, or before going to work.

Q. Did you ever see Mrs. Nixon come up there from the house at the old lock to milk that cow?

A. I have seen her in the evening?

Q. Did you ever see her there in the morning?

A. Really I don't remember, no, sir, I don't think I did.

Q. Do you know anything about the cow being fresh at this time of the accident?

A. Well, they were milking the cow.

Q. Did you ever see the calf?

A. Yes, sir, I seen it.

Q. About how old was the calf at the time of Mr. Nixon's death?

A. I don't know.

Q. What did Mr. Nixon do with the milk in the morning after he had milked the cow?

A. The track walker generally carried it back down there.

Q. Was that William Venable?

A. Yes, sir.

Q. Do you know how long William Venable has been in the employment of the company?

A. Yes, sir.

Q. Was he there when you went to work for the Company?
A. Yes, sir.
Q. Did Mr. Nixon ever give you any instructions about watching out for the trains?
A. Yes, sir.
Q. What did he tell you about that?
A. He told us to be careful and watch out.
Q. Are there many people passing up and down the track at that point?
A. Yes, sir, right smart sometimes.
Q. How about that early in the morning, were there many people there at that time of day passing up and down between Mr. Nixon's house and the tool house?
A. I never seen nobody there.
Q. Did you see many passing along that way in front of Mr. Nixon's house at any time of the day?
A. There was mighty few.
Q. Up at Midway there was some passing up there?
[fol. 134] A. Yes, sir.
Q. But between Midway and Mr. Nixon's or Warminster, all along that line of track was there much or little passing?
A. Mrs. Desper, she has got pasture.
Q. You misunderstood my question. I meant to ask you whether many people walked up and down the railroad track?
A. I never seen so very many, sometimes I seen some few. I understood you to say pasture.
Q. I was talking about people walking up and down there and passing along there and not about pasture.
A. Yes, sir.

Cross-examination.

By Mr. Drysdale:

Q. There is a well defined foot path on each side of the track from Midway to Mr. Nixon's house and beyond, isn't there?
A. I don't understand you.
Q. There is a well defined foot path?
A. Yes, sir.
Q. A place made by people travelling with their feet?
A. No, more than it is anywhere else.
Q. But there is a path and you can easily see that people have been travelling along there?
A. Yes, sir, you can walk along on it.
Q. As a matter of fact the road from Midway up to Mr. Nixon's house and beyond was nearly twice the distance that it would be to walk on the railroad, wasn't it?
A. Yes, sir.
Q. As a matter of fact everybody who wanted to go to Mr. Nixon's or somewhere beyond there would walk on the railroad?
A. Yes, sir.

Q. And there is a crossing there right near Mr. Nixon's house to some low grounds?

A. Yes, sir.

Q. A pretty big low grounds, some hundred acres?

A. Yes, sir, west of the house.

Q. And people would start early in the mornings to go there to work, wouldn't they?

A. Yes, sir.

Q. And unless they came there with a wagon they would walk alongside the track?

[fol. 135] A. Yes, sir.

Q. Now you say Mr. Nixon was milking this cow at the time of his death?

A. Yes, sir.

Q. He had milked the day before?

A. Yes, sir.

Q. You had seen him do that?

A. Yes, sir.

Q. How many days before his death had you seen him milking the cow?

A. I was working with him all the time and he did it every day.

Q. He had been milking that cow every day up to the time of his death?

A. Yes, sir.

Q. Had he been milking it as much as three months?

A. I cannot give you the month or date, any how I know he had been milking it.

Q. Would you state that he had been milking it for two months before his death?

A. Yes, sir.

Q. When did that cow come fresh?

A. I don't know.

Q. It must have been fresh for more than two months if he had been milking her for two months?

A. I said about two months.

Q. Call it six weeks, would that be right?

A. I cannot say no special time.

Q. Why did you tell us it was two months?

A. I said about two months.

Q. It was more than one month?

A. Yes, sir.

Q. How old was the calf?

A. I don't know.

Q. He had been milking it for about the same time the calf had been in existence, less than ten days, hadn't he—don't you know when the calf was born?

A. No, sir.

Q. That would be something fine for the boss's cow to have a calf, wouldn't it, and wouldn't they have been talking about it?

A. I don't know.

Q. How old was this calf at the time Mr. Nixon was killed?
[fol. 136] A. I don't know.
Q. Where was it kept?
A. In Mr. Dunn's pasture, in the corner of the fence in a little pen.
Q. And you had seen it many times?
A. Yes, sir.
Q. Did you see it the day before Mr. Nixon was killed?
A. Yes, sir, the calf was there after he was killed.
Q. But did you see it the day before Mr. Nixon was killed?
A. Yes, sir.
Q. Then give us some idea how old it was?
A. I don't know.
Q. You couldn't say?
A. No, sir.
Q. You couldn't say whether it was one month or three months old?
A. No, sir.
Q. Now you all started off at two minutes past seven when Mr. Nixon did not appear that morning?
A. Yes, sir, by our time.
Q. Did you go to the cow pasture to see whether he was there or not?
A. No, sir.
Q. The place where the cow was usually milked was behind a little bit of a hill and you coudn't see behind it?
A. You couldn't see behind the hill?
Q. And that is where the cow was usually milked, wasn't it, and you couldn't see the place from the tool house?
A. No, sir, no more than you could see the top of it.
Q. The place where the cow was usually milked you couldn't see it from the tool house. Now how did it come that you saw it every morning, did you go there every morning to see if it was being milked?
A. No, sir, he used to milk and bring the milk to the tool house.
Q. You said you saw him milking the cow?
A. Yes, sir.
Q. Now you tell us you couldn't see him.
A. I could see from the gate and we knowed where he got it at.
Q. When you found Mr. Nixon's body it was over the edge of the bank. There is a bank that slopes down at that particular place, isn't there?
A. Yes, sir, it is level for a certain distance and then it starts over on a slope.
[fol. 137] Q. How far from the rail nearest to the bank would it be from the edge of the bank—as far as from you to me?
A. No, sir, where he was laying from the rail it wasn't but seven or eight feet.
Q. Just indicate that, how far would you say that was?
A. I cannot say what that is.

Q. Can't you indicate what seven or eight feet is?

A. I guess it would be something to that gentleman over there.

Q. This gentleman over there?

A. Not quite as far as that, that fellow's foot behind the table, it might not be that far.

Q. Is it this gentleman you mean, or this one (indicating)?

A. No, sir, that gentleman behind there.

Q. This gentleman here (indicating)?

A. Yes, sir, but it might not have been that far.

Q. You call that seven or eight feet?

A. Yes, sir, as far as I can guess at it.

Q. And then he was down the bank some distance.

A. On the slope of the bank a little bit.

Q. There was a good deal of brush growing on the bank and grass and weeds and so forth?

A. Yes, sir, we hadn't cut it yet.

Q. How far was the body down the bank?

A. It wasn't so far.

Q. It was almost concealed when you came along?

A. You couldn't exactly see unless you were looking for it, the grass was high at that time.

Q. Now the buckets that you found. Do I understand correctly that you found the milk bucket and the dinner bucket, is that correct?

A. Yes, sir.

Q. You didn't find the bran bucket at that time?

A. No, sir, not at that time.

Q. How do you know there was a bran bucket?

A. The bran bucket was a common tin bucket, between this bucket and this one here (indicating).

Q. Has it ever been found; did you find it?

A. Yes, sir, we found it, but we left it around there and we couldn't find it any more.

Q. When did you find the bran bucket?

A. When we cut the right of way.

Q. When was that?

A. Along in August of that summer.

[fol. 138] Q. When were those two buckets picked up?

A. I don't know exactly how long it was.

Q. I think it was in evidence at the last trial that they were still at the place of the accident.

A. Yes, sir, I think it was between that last time.

Q. They have been picked up since the last trial?

A. Yes, sir.

Q. Do you know who picked them up?

A. The force picked them up.

Q. Were you there at the time?

A. Yes, sir.

Q. Were you sent out for that purpose?

A. No, sir.

Q. How many was there?

A. Six of us, I think, I cannot exactly tell.

Q. Are you prepared to swear that these are the identical buckets that were carried by Mr. Nixon?

A. Yes, sir.

Q. How can you identify them?

A. This was his dinner bucket.

Q. How can you tell that?

A. I had a bucket like it myself and at the same time it had a common tin top on it and this was enamel.

Q. Where was the top?

A. It has never been found.

Q. Can you explain how that top has never been found? There was a careful search made for it, wasn't there?

A. Yes, sir, but that was found above there, and we didn't keep that.

Q. Tell us what mark there is on that bucket that makes you so positive that it is the one carried by Mr. Nixon?

A. I am well acquainted with it.

Q. Can you show the jury any mark on that bucket?

A. No, sir, no more than I am well acquainted with it.

Q. And the same thing is true of the other bucket?

A. Yes, sir.

Q. Did you find any bran on the track that morning?

A. I didn't pay any attention to the bran.

Q. Do you know whether there was any there?

A. I didn't pay any attention to it.

Q. Did you see any?

A. I didn't pay no attention to the bran.

[fol. 139] Q. Did you see any?

A. I didn't look for any.

Q. Did you see any?

A. No, sir, there was so many other things there I didn't notice any, there was his handkerchief there, and flag.

Q. Where did that umbrella come from? Who brought that umbrella there that Mr. Nixon was covered with?

A. I don't know whose it was. Mrs. Desper and William Venable put it on him, but I don't know whose it was.

By Mr. Long:

Q. Did you see that top on the pilot of the engine?

A. You mean the bucket top?

Q. Yes, sir.

A. That was carried away above there, we found that above the bluff but we couldn't find it any more, it was sticking on the front part of the pilot, when the train passed me.

Q. When the train passed you, you saw that tin bucket top sticking on the pilot?

A. Yes, sir.

By Mr. Drysdale:

Q. Wasn't the fact that you saw that tin bucket top on the pilot of the engine that made you suspect the train had killed Mr. Nixon?
A. No, sir, I wasn't looking for anything like that.
Q. Did I understand you correctly to say that you saw the top of that tin bucket on the pilot of the engine when it passed you?
A. On the engine?

By Mr. Drysdale: Read his answer.

(Answer of witness is read.)

Q. Wasn't that what made you start out to make a hunt for Mr. Nixon?
A. No, sir.
Q. That did not make you suspect anything?
A. No, sir.
Q. If you were so well acquainted with the bucket you were equally well acquainted with the top, weren't you?
[fol. 140] A. The top didn't come off at that time.

Witness stands aside.

Court adjourns until tomorrow morning, Friday June 8, 1923, at 9:30 A. M.

Friday Morning, June 8th, 1923—9:30 a. m.

Continuation of Evidence on Behalf of Defendant

C. J. GEYER recalled.

By Mr. Long:

Q. How far will a train go in a second when it is moving at the rate of 25 miles an hour?
A. 36 and a fraction feet.
Q. Yesterday in your examination you were asked distance from the beginning of the straight track west of the Nixon house, the distance from that point to the place where the accident occurred. Please state whether that distance was correctly given in your answer.
A. I think in taking the distance off the map I got the wrong station and made a mistake in the calculation.
Q. Do you recall the distance you said it was?
A. I believe I said 1511 feet.
Q. What was the true distance?
A. I expect I had better take that off again. It is on the map correctly.
Q. Please do so.
A. The exact distance by stations is 1377 feet instead of 1511.

Q. 1377 feet?

A. Yes, sir.

Q. Please state again the distance from that point to the Nixon house?

A. From the point of curve?

Q. From the point where the curve begins back to the Nixon house?

A. That distance scales 575 feet.

Q. Did you estimate the distance along the track or straight to the house?

[fol. 141] A. That is along the track.

Q. The distance along the track from the beginning of the straight side track to a point immediately in front of the Nixon house is 575 feet?

A. Yes, sir, it scales that on the map, that is, from the point of curve.

Q. I asked you on yesterday what Mr. Nixon's compensation was and you stated what it was. Do you recall whether or not he paid anything for the use and occupation of the section house in which he lived?

A. Yes, sir, he paid a rental of $5.00 per month for the house and stable and approximately a quarter of an acre of ground.

By Mr. Drysdale:

Q. If I understand correctly he rented that place from the railroad company just as if he had rented it from any individual?

A. Yes, sir.

Q. And he paid his rent out of his salary?

A. I suppose he did.

Q. Anyway, the house was not an additional compensation, that is what I want the jury to understand. He paid $5.00 a month for it, the house wasn't given to him?

A. No, sir.

Q. And you told us he got $133.66 a month?

A. That was his monthly salary.

Q. And he paid you $5.00 a month?

A. Yes, sir.

Q. I didn't quite catch you when you said it was 575 feet from the Nixon house, to what point?

A. To the point of tangent west of the Nixon house.

Q. That means where the line begins to be straight?

A. Yes, sir.

Q. Now those figures you have given us are estimates based on the supposition that this map is *abs*olutely correct, in every particular?

A. Yes, sir.

Witness stands aside.

TARLETON FLEMING (col'd) sworn for defendant.

[fol. 142] Direct examination.

By Mr. Long:

Q. Your name is Tarleton Fleming?
A. Yes, sir.
Q. Where do you live?
A. I live about two miles from Midway Mills.
Q. What is your business or what is your employment?
A. I generally work on the section for the Chesapeake & Ohio Railway Company.
Q. Were you one of the section hands working under Mr. Nixon who was killed two years ago?
A. Yes, sir, I was working extra at the time.
Q. How long had you been working there?
A. Had I been?
Q. Yes.
A. I reckon I had been working there off and on for about two years at the time working extra, as near as I can get at it.
Q. What time did you go on duty in the morning?
A. I went on duty at seven o'clock.
Q. At what point did you meet Mr. Nixon to begin work?
A. At the tool house.
Q. Is that the tool house at or near Midway?
A. Yes, sir.
Q. Do you remember going there on the morning of the 21st of June when he was killed, two years ago?
A. Yes, sir, I can.
Q. Do you recall what time you came to that point on that morning?
A. Really I could not exactly tell what time it was when I got to the tool house, but I was there at seven o'clock.
Q. Did you see the train go by that struck Mr. Nixon?
A. I did not, no, sir, I hadn't got there.
Q. Did you hear it?
A. Yes, sir, I heard it ring.
Q. Please tell the jury what you and the other men did when Mr. Nixon did not appear at the regular hour?
A. We got to the tool house and after staying there—I didn't have any watch really, but the boys said it was about two minutes after seven and they started away from there after he didn't come.
Q. How did they go?
[fol. 143] A. How did they went?
Q. Yes.
A. On the lever car.
Q. They took the lever car out then?
A. Yes, sir, and put it on the track and they eased on down the road.
Q. Were all of the men on the car?
A. Yes, sir.

Q. Just state what they found as they went along down the track?

A. We got some distance from the tool house, really I don't know how far, but we commenced to find pieces of the little car, and we continued on down the road a little further and found a little more pieces and then we got to where he was.

Q. How were you going at that point, were you all on the car?

A. We all was on the car until the pieces began to get right big and one of the boys I think got off and walked along, I suppose he was looking until they found him.

Q. Who found him, do you recall?

A. I think William Shipman, as far as my remembrance goes.

Q. Where was he lying?

A. He was lying just over the other side the walk down on the edge of the grass.

Q. Down on the slope?

A. Yes, sir, just on the slope.

Q. About how far from the north rail of the track?

A. I didn't measure it really but if you will allow me to make a rough guess, I could do that.

Q. Just go ahead and do that?

A. As far as I remember between eight and ten feet, as near as I can get at it. Of course I didn't measure it but that is my guess.

Q. After you found Mr. Nixon's body what did the section men do?

A. After we found Mr. Nixon's body I stayed on the car and John Rose and Venable got off and the rest of us went down to send a message to Mr. Douglass and they went on down but I didn't go any further than down to Mrs. Nixon's house.

Q. You went with the rest of the men as far as the Nixon house.

A. I did.

Q. And Johnny Rose and Venable stayed with the body?

A. Yes, sir, Johnny Rose and Bill Venable stayed with the body. [fol. 144] Q. And the rest of the men went on down the track and you got off at the Nixon house?

A. Yes, sir.

Q. As you approached the Nixon house did you see Mrs. Nixon?

A. Just before we got there, yes, sir, I seen her.

Q. Where was she?

A. She was coming a little ways off from the porch.

Q. Out on the ground?

A. Yes, sir.

Q. What was she doing?

A. She wasn't doing nothing only walking on up there from the porch.

Q. Did the car stop in front of her house?

A. Yes, sir, it stopped, really I don't know whether it was directly in front, or not, but it was somewhere near opposite her house.

Q. Was anything said to her by anybody on the car?

A. Yes, sir, there was.

Q. Who said it and what was said?

A. William Shipman said Mr. Nixon is dead, if my mind serves me correct, he was dead, and Mrs. Nixon said "is he" and Will said "yes, he sure is dead," and she said "Oh my, what am I to do," and then she told Shipman to let somebody stay there with her until somebody got there, and he told me to get off and stay there, and I did so. I went over there and stayed and shortly after I got there she asked me would I go up and tell Mrs. West to come down and stay with her and I hurried on up there and told Mrs. West what she said and Mrs. West came on out in a short time.

Q. Did she say anything else to you other than to tell you to go up to Mrs. West?

A. I cannot remember that she said anything else.

Q. How long after you got off the car was it before you went and called Mrs. West?

A. How is that?

Q. How long was it before you went up and called Mrs. West?

A. After I got there?

Q. Yes.

A. It wasn't very long, a short time.

Q. Do you mean two or three minutes or a few minutes?

A. Yes, sir, it was a short time.

Q. Was that the first thing Mrs. Nixon said to you, to go and get Mrs. West?

A. Yes, sir, that is the first I can remember she said to me.

[fol. 145] Q. She didn't ask you anything more about the accident, did she?

A. No, sir, she did not.

Q. Did you come back to the house after you had summoned Mrs. West?

A. Yes, sir, I did.

Q. How long did you stay there at the house?

A. Really I couldn't tell you.

Q. Did you see Mrs. Nixon any more or did you have any further conversation with her?

A. No, sir.

—. Do you know whether Mr. Nixon had a cow up there by the tool house, or not?

A. He had a cow up there at the time, yes, sir.

Q. Did you ever see him milk that cow?

A. Who, Mr. Nixon?

Q. Yes?

A. Milk the cow?

Q. Yes?

A. I have.

Q. How often?

A. How often?

Q. Yes?

A. I seen him pretty much every time I went to work in the morning.

Q. Pretty nearly all the time?

A. Yes, sir. Of course I was working extra.

Q. Do you recall whether at the time of the accident this cow was fresh?

A. She had a calf.

Q. Do you know how old the calf was then?

A. Really I couldn't tell you.

Q. How old did it appear to be?

A. I don't know, I didn't take much notice of the calf, but it was there.

Q. How long had it been there; some days before the accident?

A. Yes, sir, it had been there several days before the accident all right, but how long, I really couldn't tell you.

[fol. 146] Cross-examination.

By Mr. Drysdale:

Q. Tarleton, you had seen Mr. Nixon milk that cow practically every morning for several months, hadn't you?

A. For several months?

Q. Yes?

A. He was milking her, yes, sir, I seen him milk her, she was giving milk.

Q. And you had seen him milk that cow practically every morning, you may have missed a morning once in a while, for at least three months before the time of Mr. Nixon's death, you had seen him milk that cow for three months?

A. I couldn't say for sure whether it was three months.

Q. Was it as much as two months?

A. I couldn't say, but I seen him milk the cow.

Q. Was it as much as one month?

A. I have seen him milk when I was there but I didn't take no account of the months or time, but I have seen him milk it all right.

Q. You have seen him milk it about a year before that?

A. I have seen him milk it.

Q. As much as a year before that time?

A. I don't specify no time but when I go down there I would see him milk it.

Q. The time is very material; tell it if you know?

A. I didn't take no particular notice of that but I have seen him milk it.

Q. And you are quite sure that you saw him the morning before he was killed?

A. I wouldn't specify no time because I might be wrong.

Q. Don't talk so much, just listen to my questions and try to answer them.

A. I will.

Q. Are you quite sure you saw Mr. Nixon milk that cow the morning before he was killed?

A. I couldn't say that.

Q. Are you quite sure you saw him milk in the morning before that?

A. I couldn't say that.

Q. Are you quite sure you saw him milk it a week before?

[fol. 147] A. A week before?

Q. Yes?

A. I have seen him milk every time I was down there pretty much every morning.

Q. Then you were down there pretty much every morning before he was killed, weren't you?

A. I couldn't say that. I was working extra and I didn't take no note of the mornings I was there, but off and on very often.

Q. How much off and how much on?

A. That is the reason I say often, because I couldn't tell you how often.

Q. You are not prepared to say to this jury that you had seen Mr. Nixon milk this cow as much as ten days before the accident?

A. I wouldn't swear that. As I told you it was this way, if I say that I may be wrong for this reason, I worked there but at the time, ten days, I don't know whether I was working every day because I was extra, as I said.

Q. Then you may not have been working there ten days before the accident, you may have been laid off and just started working on the morning of the accident. Is that right?

A. No, sir, I was working there before that morning.

Q. That is the best you can tell us as to when you were working?

A. I didn't take no account of the time, but I worked there.

Q. Now on the morning of the accident, which was the 21st of June, 1921, you started out with the other men, as I understand, about six of you, from the tool house to go in the direction of Mr. Nixon's house, on this hand car?

A. Yes, sir.

Q. What made you start out so soon, as two minutes after seven o'clock, why didn't you wait a few minutes to see if Mr. Nixon would appear?

A. Because we knowed that he was always there at seven o'clock.

Q. Did any of you go to the cow pasture to see whether he was there?

A. No, sir, we didn't do that. If he had been there I guess we could have seen him.

Q. The place where the cow was milked was behind a little bit of a hill and you couldn't see it from the tool house?

A. You couldn't see?

Q. What I mean is the cow was usually milked behind a hill and you couldn't see that place from the tool house. Isn't that correct?

[fol. 148] A. You could see.

Q. How much of it?

A. You could see all of it, if you looked.

Q. Isn't there a little bit of a hill there?

A. There is a kind of a little rise.

Q. And then there is a hollow on the other side of the rise?

A. No, sir, but if you go quite a way you might find it, but you could see it all right from the tool house.

Q. Johnny Rose or J. L. Rose, he was among the men, wasn't he?

A. Yes, sir.

Q. And he told all of you men that he had seen this train go by that you later found had killed Mr. Nixon, didn't he?

A. That he had seen the train go by?

Q. Yes?

A. I don't know—he seen the train pass?

Q. Yes?

A. Yes, sir, he said he was coming on, I don't know how far he was from the tool house.

Q. And didn't he further tell you that when the train went by he saw the top of a bucket which he was afraid was Mr. Nixon's bucket on the pilot of the engine and that is why you started out to look for Mr. Nixon's body, isn't that so, now come across and say if that is true?

A. He did say that he had seen a bucket top on the pilot.

Q. He did say that?

A. I think he said he had seen a bucket top as it passed.

Q. Now did he say he saw a bucket top and that is why you started out so early, and that is why you were practically certain that Mr. Nixon was on the track or by the track?

A. I don't know whether he was on the track, or not, I guess we thought something had happened because he hadn't come in.

Q. Of course you thought so, and that is why you started out, because he had not come in?

A. Yes, sir.

Q. You testified at the last trial, didn't you?

A. I was right here, yes, sir.

Q. You never mentioned that fact at that time?

A. Which fact?

Q. That the top of the dinner bucket was on the pilot of the engine as it passed?

A. I didn't see it.

[fol. 149] Q. That was never mentioned by any one of you men at the last trial as far as you know?

A. It wasn't mentioned by me.

Q. And that is why you started out along the track?

A. I don't know.

Q. I mean all of you, the whole bunch started out to look?

A. Because he hadn't come and we started to look for him.

Q. And because J. L. Rose had seen this top of the bucket on the pilot of the engine you felt morally certain that the train had run Mr. Nixon down and you started out to look for his body?

A. We started down there because he hadn't come at the usual time, seven o'clock, but about the bucket top, I couldn't tell you anything about that.

Q. How many buckets did you find at the place where you found the man?

A. I didn't stop there at the time, I went on down and when we came back up there I seen two buckets.

Q. What sort of buckets were they?

A. One was a dinner bucket.

Q. What was the other one?

A. A bran bucket, I reckon.

Q. That does not give the jury much information.

A. Suppose we say it was a bran bucket.

Q. Whereabouts were those buckets lying when you saw them?

A. Just off down, well, when I seen them I guess they were lying around there and they had done sorter gathered those up when I came back up there.

Q. They had gathered them up?

A. I suppose so, I seen them, but I don't know about that, I wasn't up there when they found them.

Q. Do you know the size buckets they were that you saw—don't tell what anybody else said, but tell what you know?

A. I will come pretty near telling what I know about it, as far as I know about it.

Q. Then go ahead, what size buckets were they that you found and whose buckets were they?

A. The dinner bucket was what I often seen him take his dinner in.

Q. Was there any particular mark on that bucket by which you could identify it?

[fol. 150] A. No, sir.

Q. It was just like any other dinner bucket of the same general description, wasn't it?

A. Yes, sir.

Q. You could buy one like it in any hardware store?

A. Yes, sir, I suppose so.

Q. Now the other bucket, what was that?

A. The other little bucket?

Q. Yes, sir, the little bucket?

A. It was a kind of a small bucket.

Q. Kind of a small bucket?

A. Yes, sir.

Q. Can you give us any idea how much it would hold, a pint, a quart, two quarts?

A. I couldn't tell you.

Q. Come on now, you can tell us whether it would hold two quarts or something?

A. I could guess at it.

Q. Anybody knows the difference between two quarts and a pint, but you say you don't know anything about that?

A. Sir?

Q. You don't know anything about that?

A. Let me see now, really I couldn't tell you how much the bucket would hold.

Q. And they had been gathered up by the other men?

A. They were there, both of those buckets.

Q. Did you see any bran on the ground?

A. I didn't notice any bran on the ground, no, sir, because I stayed on the car when I got there, and I wasn't looking for that, but of course the other boys were picking up the things while I was on the car.

Q. The other boys didn't pick up the bran, did they?

A. I wasn't looking for the bran.

Q. Come on now, didn't you see it?

A. No, sir, but if there had been a bushel of bran there, I guess they would have called my attention to it at the time.

Q. Now if you saw Mr. Nixon milking his cow practically every morning, what time did you get to the tool house?

A. I would get there sometimes about two or three minutes before seven and sometimes five minutes before seven and sometimes ten minutes.

Q. And at these times, when you got there about two or three minutes before seven o'clock you saw him milking the cow?

[fol. 151] A. Just any time I would get there.

Q. If you got there at twenty minutes to seven he was milking and if you got there at two minutes before seven, you saw him milking?

A. I didn't say that.

Q. Didn't you say you saw him practically every morning?

A. I was an extra worker, you know, and I seen him. If I say I didn't see him, that would be wrong, because I sure did see him.

Q. Now you said you all got on the car and that you went on down and found some pieces of the car. I didn't catch that part of what you said, what did you say about that?

A. When we first commenced picking it up, only pieces you know, we continued down and got a little more pieces.

Q. Until they began to get numerous, and then I didn't catch what you said.

A. Until we got to him, until we found him, but we first found some brief pieces and then we come to him.

Q. What was that you said, I didn't understand the word you used.

By Mr. Long: The word was brief.

A. I cannot talk plain you know.

By Mr. Drysdale:

Q. I thought you said brief but I though I made a mistake: until they began to get numerous.

A. I ain't got much sense like you all but I will tell it so you can understand it.

Q. I want you to tell the truth, the whole truth, and nothing but the truth and tell it so that we can understand it.

A. I am going to try to give it to you that way boss.

Q. Now try again. Tell us whether you got there at two minutes to seven and found him milking his cow, and if you got there at twenty minutes to seven you found him milking his cow?

A. I cannot tell that.

Q. I thought that is what you said.

A. I cannot tell you about two minutes, I said a few minutes.

Q. Now when you got to Mrs. Nixon's house you say Mrs. Nixon was in the yard?

A. Yes, sir, a little ways off from the steps.

Q. And she didn't seem to be excited or interested in a gang of [fol. 152] men coming along without her husband. Usually when you went along there in a bunch Mr. Nixon was there, he was the foreman, wasn't he?

A. Yes, sir.

Q. And she could see quite plainly that Mr. Nixon was not one of the party?

A. Yes, sir.

Q. Because the railroad track was only some few steps from where she was standing?

A. Yes, sir.

Q. And she didn't come up and say "where is my husband?"

A. No, sir.

Q. She didn't seem to be interested in anything; was she crying or did she seem distressed?

A. She wasn't crying when we drove up there, as I know of.

Q. Will you say positively and distinctly that she was not crying?

A. I couldn't say that, no, sir.

Q. She didn't ask you how her husband got killed?

A. No, sir.

Q. And you didn't volunteer the information as to how he got killed?

A. You mean to tell her?

Q. Yes?

A. I didn't.

Q. Didn't the way she acted convince you that she knew how he had been killed and that he had been killed?

A. When we got there Shipman told her that Mr. Nixon is dead and she said, "Oh, is he dead," and Bill said, "yes, he sure is," and she said, "Oh, what am I to do."

Q. She didn't ask Bill Shipman ——

A. That is the words she said. Bill said he was going on down to notify Mr. Douglass and she said, "let somebody stay here with me until you come back."

Q. She didn't ask him how her husband got killed?

A. No, sir, I didn't hear it.

Q. If she had said it, you were right there and you would have heard it?

A. I guess so.

Q. You heard all of the other things that you have told us about?

A. Yes, sir, I did.

[fol. 153] By Mr. Long:

Q. Did Johnny Rose say anything about that bucket top that he saw on the front of the engine being Mr. Nixon's bucket top?

A. He didn't say it was Mr. Nixon's bucket top, I didn't hear him say that, he said he saw a bucket top.

Q. When you came there in the morning and found Mr. Nixon there, where did you find his velocipede?

A. It was knocked up the road.

Q. I don't mean that morning but every morning, when you came there, where did Mr. Nixon put the velocipede?

A. When he came to the tool house?

Q. Yes.

A. Where he put it? He would take it off there at the tool house.

Q. And you would find it there in front of the tool house?

A. Somewhere around there, yes, sir, near the tool house, some place.

Q. And whenever he was there you could find or see the velocipede there?

A. Yes, sir, we would know whether he was there, all right.

Witness stands aside.

JOHN ROSE (col'd) sworn for defendant.

Direct examination.

By Mr. Long:

Q. Your name is John Rose, I believe?

A. Yes, sir.

Q. And where do you live?

A. Midway.

Q. What is your employment?

A. Section hand.

Q. How long have you been employed as a section hand?

A. About 28 or 29 years.

Q. You have been working for the Chesapeake & Ohio Railway Company for 28 or 29 years?

A. Yes, sir.

Q. And always at that point along the road?

A. I was working on that section.

[fol. 154] Q. I will ask you now about William Venable, how long has he been working there?

A. About the same, or maybe longer.

Q. He has been working there as long as you have been working there?

A. Yes, sir.

Q. For 28 or 29 years.

A. Yes, sir.

Q. What are your duties as a section man, what do you do?

A. Tamp ties, put in ties, spike ties, and such as that, just what was required from my foreman.

Q. Who was your foreman?

A. I had several foremen during that time, but I done forgot all I did work under, but several.

Q. You worked under Mr. Nixon, who was killed about two years ago?

A. Yes, sir.

Q. At what time did you go on duty in the morning?

A. Seven o'clock.

Q. At what point do you begin work or go to begin work?

A. At the tool house, we all get together at the tool house.

Q. At Midway?

A. Yes, sir.

Q. What was Mr. Nixon's habit with respect to being at the tool house in the morning?

A. He had a way or habit of coming up there every morning before seven o'clock to milk his cow. He would get there on the wheel about twenty minutes of seven, or something like that, to milk the cow before he went to work.

Q. Have you seen him doing that?

A. Yes, sir.

Q. Where was the cow kept?

A. In Mr. Dunn's pasture.

Q. Was that near by the tool house?

A. Yes, sir, right in front of the tool house door.

Q. Was the cow kept up there all the year round or only at a certain time?

A. She was put in there after spring taken place. She was put in there about the first of May.

Q. This cow had been in that pasture near the tool house since early in the spring?

[fol. 155] A. Yes, sir.

Q. Do you remember whether Mr. Nixon was milking her just before the accident?

A. Yes, sir, he was milking her just before the accident?

Q. And up to the time of the accident?

A. Yes, sir

Q. Something has been said about the cow being fresh and not being milked just at that time. What do you recall about that?

A. I don't really remember how old the calf was, about that time, but that calf was between two or three weeks old.

Q. At the time of the accident?

A. Yes, sir.

Q. And at the time of the accident he was milking the cow?

A. Yes, sir.

Q. What did he do with the milk after he milked the cow in the morning?

A. He would set it in the tool house until the track walker went west and the track walker would carry it back to his house.

Q. Who was the track walker?

A. William Venable.

Q. That came under your observation, that he did that?

A. Yes,

Q. Now ... the morning when the accident occured do you recall about the time you got there?

A. I was at the tool house about 20 or 25 minutes after six o'clock, I generally came down about half-past six.

Q. Were you at the tool house when the train passed by?

A. Yes, sir. I was there.

Q. Had you seen Mr. Nixon coming towards the tool house on the track?

A. No, sir, I hadn't seen him at that time.

Q. You didn't look towards the house?

A. No, sir.

Q. And you hadn't seen him on the track?

A. No, sir.

Q. The train passed through while you were there?

A. Yes, sir.

Q. One of the witnesses, your son, testified that he saw this same train go by and he observed a bucket top on the pilot of the train. Did you see that?

A. I didn't see the bucket top, but he called my attention to it, he said, "Papa, I seen a bucket top on the pilot of that train, mighty [fol. 156] like Mr. Nixon's bucket top," and I said to him "it was too early for anyone to be out at that time," and we didn't think any more then, but he thought something about that bucket top because his bucket top and Mr. Nixon's bucket top was just alike, but I didn' think anything more about it.

Q. You didn't think anything more about it?

A. No, sir.

Q. Did he mention that to the other men?

A. Yes, sir, to the whole force.

Q. Who was there when he mentioned that?

A. All six of these men what are here.

Q. But you did not attach any importance to it?

A. No, sir.

Q. When Mr. Nixon didn't appear at seven o'clock what was done by the section men?

A. At seven o'clock he didn't come and some of them said, "Well he ain't got here, he is generally always here about twenty minutes to seven, but he ain't come yet, and we will take out the car and go that way and meet him."

Q. You didn't think of looking in the pasture to see if he was there, did you?

A. No, sir, because I was there when the train pased and I knowed when he always come he took his wheel off at the pasture.

Q. When he came you would always know by his having the velocipede off there, that he was there?

A. Yes, sir.

Q. And therefore you didn't go to the pasture?

A. No, sir

Q. Was it discussed or was the question discussed among the men as to whether the train had struck him?

A. No, sir, we didn't know whether he was sick or something of the kind and we could go to his house to see what was the matter with him.

Q. Please give an account to the jury of what they did in going down the track to look for him?

A. We started on down the track a piece from the tool house and we first found a piece of the wheel that he was on along in the track. Some of the men said, "there is a piece of his wheel laying down in the middle of the track." We had run over it and we looked around and stopped and picked up that piece and then we went on down further and the further we went towards him the more we would [fol. 157] find until we got to where he was laying. He was laying over on the bank and the wheel and all was mashed up together.

Q. Was the hand car moving slowly down the track?

A. Yes, sir.

Q. Did all the men remain on the car or did some of them get off?

A. All the men was on the car until we got to the point where he was killed at.

Q. Who found the body?

A. William Shipman.

Q. You got off the car at that point, did you?

A. No, sir, we didn't get off until we got to where he was laying.

Q. When you got there to where he was laying you did get off the car?

A. Yes, sir.

Q. Did you look around over the track at that point?

A. Yes, sir, I went and looked over the bank to see if he was breathing.

Q. Did you find anything there besides the body?

A. We found a bucket, two of them.

Q. Do you remember which buckets they were?

A. One was his dinner bucket and the other was a bucket he carried the bran in.

Q. Were they lying near the body?

A. Yes, sir, they were lying pretty near the body.

Q. Did you ever find any more buckets besides those?

A. Later on in August, we found the milk pail when we was cutting the weeds.

Q. After the body was discovered what did the section men do?

A. William Shipman said for Johnny and William Venable to get off and stay there with the body. Mr. Desper was over just a piece from us and someone called him. Mr. Desper was fixing to cut wheat over on the other side of the track and we called him and he came right straight to all of us and then William Shipman said, "you and Johnny or he told Johnny and Bill Venable to stay with the body and he would go and tell Mrs. Nixon and also go to Warminster and tell Mr. Douglass about the accident and we didn't move from there at all.

Q. You didn't move before Mr. Desper came over?
A. No, sir.
Q. And you went with the car down to Mrs. Nixon's and stopped in front of her house?
[fol. 158] A. Yes, sir.
Q. As you approached the house did you see her?
A. Yes, sir.
Q. Where was she?
A. She was standing right down on the ground just a few steps from the porch with her baby in her arms.
Q. What did she seem to be doing?
A. She just looked like anyone looking out with her baby in her arms.
Q. She just seemed to be walking around in the yard with her baby in her arms?
A. Yes, sir.
Q. Did her attention seem to be specially directed to the car?
A. She didn't show that she was worried about it at all.
Q. She did not show any special interest in the approach of the car?
A. No, sir.
Q. When the car stopped in front of her house did any of you speak to her?
A. William Shipman spoke to her.
Q. Do you remember what he said to her?
A. Yes, sir, he told her that Mr. Nixon was up here on the track, and the train had struck him and killed him.
Q. What did he say to her?
A. He spoke to Mrs. Nixon and told her that Mr. Nixon was up here dead and she screamed out then and said, "Oh Lordy, what am I to do," and she stopped then and said, "William, is he dead sure enough," and he said, "he certainly is," and then she said, "leave somebody here with me," and William Shipman told Tarleton to get off and stay with Mrs. Nixon until we could go to Warminster and report the accident.
Q. When you got down to Warminster did you come back to the scene of the accident?
A. Yes, sir, we came back.
Q. Did anybody come back with you from Warminster?
A. Yes, Mr. Horsley.
Q. And you went back to where the body was lying?
A. Yes, sir.
Q. Had any provision been made to protect the body from the sun?
A. Someone had put an umbrella over his head, but I don't know who did that.
[fol. 159] Q. What did you do with the body?
A. We taken it up then, we went back and put him on the car and then we taken him, but before that William Venable taken a bran bucket and went over to the culvert just from him and got some

water to wash his face off good and then we taken him down to the house.

Q. At that time was anybody there besides the section men and Mr. Horsley?

A. Yes, sir.

Q. Who was there?

A. Mr. Joe Ragland, he was there.

Q. Do you recall whether any lady was there, or not?

A. Mrs. Desper was there.

Q. Then after the body had been put on the car and his face had been bathed, what did you do?

A. We carried him to the house.

Q. You carried him down to his house and put him in the house?

A. Yes, sir.

Q. Do you know what became of the buckets that you referred to?

A. Yes, sir, they were all left there.

Q. They were all left there?

A. Yes, sir.

Q. When did you get them or pick them up?

A. I disremember what time we picked them buckets up, but it has been since we had the trial before.

Q. You went there and found the buckets, since we had the trial before?

A. Yes, sir.

Q. Were they the same ones?

A. The same buckets.

Q. And were they lying near the place where he was killed?

A. Yes, sir.

Q. Have you seen the buckets that were brought here to the court room?

A. I seen them before they were brought in the court room.

Q. And they were the same buckets?

A. Yes, sir.

Q. Did you have any conversation at all with Mrs. Nixon the day of the accident yourself?

A. No, sir.

[fol. 160] Q. And the only conversation you heard anyone have with her was the conversation *you heard anyone have with her was the conversation* between her and William Shipman, was it?

A. Yes, sir.

Q. Is that railroad track there between Warminister and Midway much used by people walking back and forth between those two points?

A. No, sir, very seldom you ever see anybody walking along there at all.

Q. Is there any house between Warminster and Midway near by the track with the exception of this lock house where Mr. Nixon lived?

A. No, sir, there is no house there at all.

Q. What instructions did Mr. Nixon give you, if any, in respect to the section men looking out for trains?

A. He would caution us and tell us to look out for trains, he would tell us to look out for trains, to be very particular about that, and for some one to watch one way and some the other.

Q. Did you all understand that trains might come along the track at any time?

A. Most any time.

Q. Was that your experience that trains would come along the track at any time?

A. Yes, sir.

Q. You didn't know when they were coming?

A. No, sir.

Q. Did you expect the train men to be looking out for you or did you look out for the trains?

A. We looked out for the trains.

Cross-examination.

By Mr. Drysdale:

Q. When a train would come along you expected the crew of that train, the engineer and fireman, to have their eyes open and be looking in your direction, wouldn't you?

A. We would be looking out for the train ourselves.

Q. That is not answering my question. Don't you also consider that the crew of the train would keep a lookout ahead?

A. If I was sent out to flag I would carry a torpedo and red flag so if the engineer wasn't taking notice of me he would take notice of the torpedo.

[fol. 161] Q. Did you expect that the engineer and fireman were sitting talking to each other and keeping no lookout. Is that your idea?

A. No, sir, I don't expect that they were talking to each other.

Q. Now John, as a railroad man of 28 or 30 years' experience, don't you know that it is the duty of the engineer and fireman to keep a lookout ahead at all times except when they were imperatively prevented from doing it by some other more important duty? Don't you know that to be true?

A. I always thought that we should keep a lookout when we have a car on the track.

Q. You notice you have not answered my question. Can't you answer it?

A. What did you say?

Q. Read the question?

(Question read to witness.)

A. Yes, sir, that would be true.

Q. That is true?

A. Yes, sir.

Q. Now when did you find these buckets that you have told us about?

A. We found two buckets the same day we found him.

Q. Did you find them or did some of the other men find them and show them to you?

A. No, sir, we all looked at them with our own eyes.

Q. Where did you find the milk bucket?

A. Over in the old canal in the weeds.

Q. The two buckets you found them, one was a milk bucket and one was a dinner bucket?

A. Yes, sir.

Q. Where did you find the dinner bucket?

A. One was a dinner bucket and the other——

Q. One minute——

By Mr. Long: Let him finish his answer.

A. One was a dinner bucket and the other was a bran bucket and we didn't find no milk bucket that day.

By Mr. Drysdale:

Q. Where did you find the dinner bucket, on the track or on the side of the track or among the weeds?

[fol. 162] A. We found the dinner bucket and bran bucket was up on the bank pretty close to where he was knocked off.

Q. Both close together?

A. Yes, sir.

Q. Did you find the tops of either of them?

A. No, sir.

Q. You didn't find any stop?

A. No, sir.

Q. You didn't find any tops at all?

A. No, sir.

Q. You have seen these buckets that have been introduced in Court. What are they?

A. One is a tin bucket and one is a blue enamel bucket, or something like that.

Q. That is a dinner bucket, isn't it?

A. Yes, sir.

Q. What was the other bucket used for?

A. For his milk pail.

Q. Did you find them both together?

A. What do you mean, the bran bucket and the dinner bucket?

Q. The two buckets that are there.

A. We found them pretty close together.

Q. You did not find the top to either one of them?

A. No, sir.

Q. Where did that top that is there come from. There is a top to one of them?

By Mr. Long: Suppose you let him see it.

A. The top to one of them is the milk bucket top.
Q. Look at those buckets. What is that?
A. That is the dinner bucket.
Q. And you did not find the top to that?
A. No, sir.
Q. And the other one was a milk bucket?
A. Yes, sir.
Q. And you didn't find any top to that?
A. We found the top to that when we found this bucket.
Q. That was found in August?
A. Yes, sir, some time in August.
Q. Is there any mark on that bucket by which you can tell it was Mr. Nixon's?
[fol. 163] A. No, sir, no more than the bucket, but that is his bucket.
Q. If Mrs. Nixon goes on the stand, which she will do presently, and testifies that there was a particular mark on her milk bucket by which she could identify it, will you say there was no mark on the bucket that Mr. Nixon carried?
A. There was no mark on either of these buckets except on his dinner bucket, the top has his name cut on it, his dinner bucket top.
Q. And you are quite sure there was no mark whatever on the dinner bucket?
A. No, sir.
Q. And the milk bucket was found in August?
A. Yes, sir.
Q. Did you see any bran there?
A. We found some bran the morning he was killed.
Q. Where did you find the bran, at the place where his body was?
A. Right at the place the car was knocked from under him.
Q. You did not find any bran scattered down the track at all?
A. That is where it was.
Q. Was it scattered?
A. Scattered around on the track.
Q. For how long a distance?
A. A little place right in the track, right where it was knocked from under him.
Q. How much bran was there, could you tell?
A. From the looks of it it looked like a half a gallon or something like that.
Q. For how long a space was it scattered?
A. It wasn't no space much.
Q. Give us some indication, a space that square (indicating)?
A. It was knocked in this direction, and the bran just scattered on the track like that (indicating) probably like a yard or a yard and a half.
Q. Stringing out about a yard or a yard and a half?
A. Yes, sir.
Q. And you think how much?
A. About half a gallon or three quarts or something like that.

Q. How long did that bran remain there; did anybody pick it up?

A. No, sir.

Q. It was plain to be seen and anybody could see it?

[fol. 164] A. Yes, sir.

Q. Where did Mr. Nixon get his feed from for his cow, where did he buy it; at Warminster or Midway?

A. He bought his feed from some man near the place where his wife lives now.

Q. You mean in Glasgow?

A. Yes, sir.

Q. Where was it delivered to him?

A. At Warminster.

Q. And he carried it from Warminster every day?

A. No, sir, when it would come in two or three bags he would take it and carry it to his house and then he would carry it from his house to Mid*awy* when he was milking his cow.

Q. He would carry a quantity of it up to his house and then he would take it every morning when he went to his cow?

A. Yes, sir.

Q. For how many mornings immediately prior to the accident had you seen Mr. Nixon milk his cow?

A. Prior to the accident?

Q. Yes, sir, immediately before the accident?

A. He had been milking the cow before the accident ever since the cow became fresh.

Q. How old was the calf?

A. As near as I can remember that calf was two or three weeks old.

Q. It is very important that we get not what you remember but what was the real truth. Isn't is true, John, that that calf came into the world on Sunday and Mr. Nixon was killed the following Tuesday?

A. No, sir, that calf wasn't that young, the calf was about two or three weeks old when he was killed.

Q. About two or three weeks old?

A. Yes, sir.

Q. Will you swear it was as much as ten days old?

A. Yes, sir, it was over that.

Q. Will you swear it was as much as two weeks old?

A. I don't really know but I know the calf was about that age.

Q. How long is it after a cow is fresh before you begin to milk the cow for human consumption?

A. He spoke himself about that he was going to let the calf have milk ten days and then he was going to use the milk.

[fol. 165] Q. You think the calf was only about ten days old at the time he was killed. How long had he been milking the cow?

A. He had been milking the cow some time after ten days.

Q. Then the calf must have been more than ten days old at the time?

A. Yes, sir.

Q. The calf was about two months old, would you say?

A. No, sir.

Q. About a month old; it was more than twenty days old, wasn't it?

A. Yes, sir.

Q. Was it as much as thirty days old?

A. It might have been, but I know it wasn't two months old.

Q. Before you started out to find Mr. Nixon that morning your son had brought to the attention of all six of the men that that train which passed somewhere around 6:30, when it passed him he saw what he thought was the top of Mr. Nixon's dinner bucket on the pilot of the engine, didn't he?

A. He didn't say it was Mr. Nixon's top, he said it was a top very much like his top.

Q. Didn't you say that his top and Mr. Nixon's top were identical practically?

A. After I said it was too early for anybody to be out or any section men to be out to strike him, he said "me and Mr. Nixon have got tops pretty much alike, my bucket top and Mr. Nixon's bucket top is very much alike."

Q. The train that hit Mr. Nixon, the time has been pretty well authenticated by the books of the operator at Warminster and by the time Mr. Nixon's watch stopped which was 25 minutes to seven. If Mr. Nixon was in the habit of getting down there about 20 minutes to seven to milk his cow he would just naturally be, about 25 minutes to seven, at the place where he was killed, wouldn't he?

A. I don't know, but he never was later than 6:15 at that tool house.

A. 6:15 at that tool house, to be ready to go to work.

Q. Do you mean 15 minutes before seven or 15 minutes after seven?

A. 15 minutes before seven.

Q. He never was later than that?

A. No, sir.

[fol. 166] Q. If you know that is true, that means you yourself was there at that time and saw him come at a quarter to seven?

A. I was there sometimes.

Q. You did not have any cow to milk, did you?

A. No, sir.

Q. But you got there at a quarter to seven, did you?

A. We working people always aim to walk to our work and sit down a little while before we go to work.

Q. You aim to get there about half past six or quarter to seven?

A. Sometimes I would get there at that time and sometimes I did not.

Q. Practically every man made it a rule to get there a few minutes before seven o'clock to rest before starting out to work?

A. Yes, sir.

Q. It never occurred to any one of you from the appearance of this bucket top that Mr. Nixon had been killed by this train?

A. Never occurred?

Q. It never came to any of your minds that Mr. Nixon had been killed?

A. No, sir, it never did.

Q. At the last trial of this case you were in Court practically all the time it was going on, the witnesses were not excluded and you were in the Court and heard practically all the examination?

A. Yes, sir.

Q. You recollect that I asked pretty well every colored man that went on that witness stand about that bucket top being on the pilot and none of you knew anything about it?

A. No, sir, I don't remember that.

Q. I don't say that I asked you all, but I know I asked several of you.

By Mr. Williams: Who did you ask?

By Mr. Drysdale: I have forgotten but I know I asked some of them because that was my information.

Q. Now you said the track walker carried the milk west?

A. No, sir, he didn't carry it west. Mr. Nixon would put it in the tool house and lock it up in there until he would go over the track, going west, and then when the track walker came back and was going east he would carry it down there.

[fol. 167] Q. You didn't say that the track walker carried it west?

A. No, sir, I said he put it in the tool house until the track walker came back.

Q. When the track walker came east again he carried it to Mrs. Nixon?

A. Yes, sir.

Q. He had to carry it about a mile and a quarter?

A. It might have been that or might have been a mile.

Q. That velocipede on which he carried it has no springs, has it?

A. No, sir.

Q. It is a pretty rought trip for milk, isn't it?

A. No, sir, we carry water to drink on it.

Q. Water doesn't churn but milk does?

A. Yes, sir.

Q. Won't milk churn if it is vibrated or shaken up?

A. It hadn't stood long enough for that.

Q. It hadn't?

A. No, sir.

Q. What was the first piece of the tricycle you found?

A. We found a little round piece which held the frame up around the wheel.

Q. A very small piece?

A. Yes, sir.

Q. If you were not looking for Mr. Nixon or for something belonging to him how was it you noticed such a small piece?

A. It was painted red, and the minute we laid our eyes on it we noticed it.

Q. And you knew it was a part of the tricycle?

A. Yes, sir.

Q. Then you found some more pieces and more pieces until you came to him?

A. Yes, sir.

Q. Could you give the jury any idea how long a stretch those pieces were scattered over?

A. Some part of it was carried prob*ba*ly about 9/10 or something like that, of a mile.

Q. It wasn't 9/10 of a mile from the tool house to where Mr. Nixon was killed, was it?

A. It was over that.

Q. You must have found some pieces very soon after you left the tool house?

A. Well, we didn't get very far.

[fol. 168] Q. Then tell us again what Mrs. Nixon said when you came up?

A. When we went to her house?

Q. Yes?

A. She didn't say anything until William spoke to her.

Q. What did William say?

A. William said, "Mrs. Nixon, we found Mr. Nixon up here on the track dead and the velocipede tore all to pieces."

Q. That is all he said?

A. She screamed and said, "Oh Lordy, what am I to do," and she stopped at that minute, and then she said, "leave someone here with me."

Q. You are quite sure that is what William said to her?

A. Yes, sir.

Q. That Mr. Nixon's body was on the track?

A. Yes, sir, his body was up on the side of the track.

Q. And that is all, you are quite sure?

A. She said, "leave someone here with me," and then he told Tarleton to get off and stay there with her.

Q. Then there was nothing said about the manner in which he had been killed—you told us before that he said the train had struck him and killed him, but he didn't say that, did he?

A. I told you that Tarleton said that.

Q. Tarleton didn't say the train had killed him, but he simply said he was killed?

By Mr. Long: Tarleton didn't say anything, he has not testified yet.

By Mr. Drysdale:

Q. Well, that was all that was said?

A. Yes, sir.

Witness stands aside.

ALEC WOODSON (col'd) sworn for defendant.

Direct examination.

By Mr. Long.

Q. Your name is Alec Woodson?
A. Yes, sir.
[fol. 169] Q. Where do you live?
A. Midway.
Q. What is your employment?
A. Railroading.
Q. With what railroad?
A. The Cheseapeake & Ohio Railway Company.
Q. How long have you been employed by that railroad?
A. I reckon I have been there about thirty-some years, but I don't know exactly.
Q. Always on the same job?
A. Yes, sir.
Q. What is that job, what do you do?
A. Section man.
Q. You are a section man?
A. Yes, sir.
Q. Were you a section man under Mr. Nixon?
A. Yes, sir.
Q. You worked under him as long as he was section foreman?
A. Yes, sir.
Q. About what time did you go on duty under him?
A. Seven o'clock.
Q. At what point did you assemble to begin work?
A. Of an evening, you mean?
Q. In the morning?
A. Seven o'clock.
Q. What point, what place?
A. Midway, at the tool house.
Q. At the tool house?
A. Yes, sir, that is right.
Q. What time were you in the habit of getting there in the morning?
A. Along about sometime about twenty minutes to seven and on like that.
Q. What was Mr. Nixon's habit with respect to getting there in the morning; how soon did he get there?
A. He used to come up pretty early to milk.
Q. Did he generally get there before you had gotten there?
A. Some mornings he would be there milking when I would come, some mornings.
Q. And some mornings he would get there after you did?
A. Yes, sir.
Q. Did you ever see him milking up there?
A. Yes, sir, oh, yes, sir.

[fol. 170] Q. How long had he been milking the cow at that piont?

A. Ever since he had her in the pasture.

Q. Did he have her in a pasture by or near the tool house?

A. Yes, sir, right close to the tool house.

Q. Do you recall whether he had been milking the cow just before the accident occurred. I mean up to the day of the accident?

A. Yes, sir, he milked her.

Q. Was the cow fresh?

A. Yes, sir.

Q. Did you see the calf?

A. Did I see her?

Q. Yes?

A. Yes.

Q. About how old was the calf at the time of the accident to Mr. Nixon?

A. I don't know exactly but she was two or three weeks old I reckon, or something like that, I don't know exactly.

Q. Had Mr. Nixon began taking some milk from the cow at that time?

A. Yes, sir.

Q. What did he do with the milk after he milked?

A. Took it home.

Q. Did he take it home himself?

A. Sometimes when he would go down the railroad he would carry it on the lever car and then when he would go up the railroad sometimes his track walker would carry it down there.

Q. When you would go down past his house on the lever car he would take it himself?

A. Yes, sir.

Q. And when he didn't do that the track walker would take it home on the velocipede?

A. Yes, sir, that is right.

Q. Now on the morning when the accident occurred, when Mr. Nixon had not appeared at seven o'clock what did the section men do?

A. After seven o'clock came and he didn't come we put on the lever car and went on down to look for him.

Q. Before you started down had anything been said by Johnny Rose about his seeing a bucket top on the pilot of the engine that had recently passed by, going west?

A. Yes, sir, he spoke about it before we went out.

Q. You remember that?

[fol. 171] A. Yes, sir, he did, yes, I remember it.

Q. Was anything said about it being Mr. Nixon's bucket top, or do you recall about that, the bucket top that he had seen on the pilot of the engine?

A. Yes, sir, he spoke about that before we left the tool house.

Q. Did he say he thought it was Mr. Nixon's, or not?

A. No, sir, he said he seen it on there but he didn't know whose it was, but he had seen it on there, and so he said that it favored that

no one but he did not know whose it was and someone said 'no, it was too early for Mr. Nixon to be out."

Q. Someone said that it was too early for Mr. Nixon to have been out?

A. Yes, sir, but he said he had seen the bucket top.

Q. Now tell the jury what happened when you went down on the lever car that morning?

A. We went on down the track after we put the lever car on and we seen a little small piece of the velocipede and kept on going down, we went down a little bit further and then we would see another pice a little larger and then we went on down a little more and we saw a whole lot of it and then we kept on going down a little bit lower and we saw some more of it and we kept on going until we got to where he was, he was over on the side or the edge of the bank, right on the edge of the bank out in the weeds like.

Q. About how far was his body from the north rail of the track?

A. From what I can say the bank is supposed to be seven feet and he was laying right on the edge like—I don't know, well, I reckon it was about maybe nine or ten feete as near as I can get at it.

Q. After finding the body what did the section men do?

A. We went on down then and told Mrs. Nixon about it.

Q. Did all of you go on down.

A. Yes, sir, we did you know, four of us did.

Q. Did anybody stay with the body?

A. We went on down there and Bill Shipman told her.

Q. What I asked you was whether anybody, when you *satrted* back to go further down the track, whether anybody was left with Mr. Nixon's body?

A. Oh, yes, sir, we left two there.

Q. Who were they?

A. John Rose was one—let me see, who was the other one, we left two there, let's see, who the other one was, I think it was Bill Venable, anyway there was two left there and John Rose was one, but Tarleton went on to the house with us.

[fol. 172] Q. Tarleton went on down with you all?

A. Yes, sir.

Q. Who else went on down with you?

A. Bill Shipman and myself and John Rose.

Q. Four of you went down?

A. Yes, sir.

Q. And the other two were left up there?

A. Yes, sir, that is right.

Q. As you approached Mrs. Nixon's house, did you see Mrs. Nixon?

A. Did I see her?

Q. Yes.

A. Yes, sir, when we got down there she was coming on from the house towards the old shanty over on the same side and Bill Shipman told her that Mr. Nixon was up there killed, and she burst out in a cry and said, "Lord have mercy, what must I do," and then

Bill Shipman told Tarleton Fleming to stay with her. He was the man that done the talking.

Q. What was Mrs. Nixon doing when you first saw her out in the yard?

A. She was coming towards the shanty.

Q. Was she paying any particular attention to you on the hand car as you were approaching?

A. No, sir, not particular, she was coming that way.

Q. Did she seem to take any special interest in seeing you men as you came down the track?

A. No, sir, it don't look like to me, no more than she hollered out when we told her he was dead.

Q. After you had told Mrs. Nixon about Mr. Nixon's death, what did you do then?

A. We went on to Warminster and Bill Shipman reported to Mr. Douglas about it, or he went into the office for that purpose. I didn't go up there but he said he did that.

Q. After having made your report, did you come back?

A. Yes, sir, we came back then.

Q. Did anybody come with you from Warminster?

A. Yes, sir, Mr. Horsley did.

Q. Did you go back to the place where the accident happened?

A. Yes, sir.

Q. Did you find the body there?

A. Yes, sir, and we brought him up.

Q. What did you do with the body then?

A. We took it down to the house.

[fol. 173] Q. When you first came to the place where the body was found, did you see anything else there besides the body and pieces of the velocipede?

A. Yes, sir, the buckets was there, and the mill feed what he had in the bucket you know, and some spikes were in the box and some bolts were all scattered on the track.

Q. Did you see any other buckets besides the bucket with the mill feed?

A. His dinner bucket and the bran bucket, them was there, we seen them, you know.

Q. Did he have any other bucket with him besides those two?

A. Yes, sir, he had a milk bucket but we didn't find that until we cut the right of way.

Q. That was some time after the accident?

A. Yes, sir.

Q. How long after the accident?

A. This here was in June, I think, and we didn't find that bucket until along in August when we were cutting the right of way. I don't know how long it was, but I know it was in August.

Q. Some buckets have been produced here in Court and they are in front of you. Do you know those buckets, or recognize those buckets?

A. Oh, yes, sir.

Q. Tell the jury what buckets they are?

A. This here was his dinner bucket and this was the milk bucket. We found that in August when we cut the bank and bushes.

Q. Do you know what became of the bran bucket?

A. No, sir, the bran bucket, we found that that day when we taken him up. Some of the men, I think Bill Shipman, got that and got some water to wash his face, and I don't know what became of that bucket, we never could find that any more, not after that first day, I don't know what became of that. We looked around to find it but we never found it.

Q. Where have these buckets been since the accident?

A. They have been down there until we got them up.

Q. When did you get them up, since the last trial?

A. Yes, sir, since the last trial. I mean since the first trial, but I done forgot the month.

Q. You found them about where the accident occurred?

A. Yes, sir.

Q. They were still there?

[fol. 174] A. Yes, sir, that's right.

Q. Have you got any doubt about those being Mr. Nixon's buckets?

A. Any doubt about it?

Q. Yes?

A. No, sir, I know they is his buckets.

Q. What use did Mr. Nixon make of the bran bucket, what did he have that for?

A. To carry his bran for his cow when he was milking, yes, sir, the bran was in there, I seen that, I just seen it, of course, in that bucket.

Q. Was the railroad used very much between Warminster and Midway by people walking between those two points?

A. No, sir, not very much.

Q. Was there any other house along the line except the Nixon house between those two points. I mean close to the railroad?

A. No, sir, not close.

Q. You worked under Mr. Nixon as long as he was the foreman and you had been working there a long time before?

A. Yes, sir.

Q. What instructions did you have about looking out for trains?

A. I watched for them all the time, yes, sir, when we have got the car on the track I am watching for them all the time.

Q. Is that what Mr. Nixon told you to do?

A. He used to tell us that sometimes, sometimes he did, and then again sometimes he did not.

Q. You understood that you had to be on the lookout all the time for trains?

A. Yes, sir.

Q. You did not know when they were coming?

A. No, sir. I have stopped the car many a day and he has asked me what I stopped for and I would tell him "yonder comes the train," yes, sir, many a time.

Q. That is when Mr. Nixon was riding on the car with you all?

A. Yes, sir.

Q. And you were operating the car, were you?

A. Yes, sir.
Q. And you were looking ahead and keeping a special lookout?
A. Yes, sir.
Q. I suppose Mr. Nixon was looking at the track, or what was he doing?
[fol. 175] A. He was riding with us.
Q. And you have stopped the car many a time?
A. Yes, sir.
Q. And he wanted to know what you had stopped for?
A. Yes, sir, the men know it, and I would tell him that a train was coming. I generally always applied the brake or rode the brake.
Q. When you say you rode the brake, you mean you worked the brake on the car?
A. Yes, sir, you put your foot on and bear down on it and that will stop it.
Q. I didn't know how that worked.
A. Yes, sir, that is how you do it.

Cross-examination.

By Mr. Drysdale:

Q. Alec, please take up the dinner bucket in your hand and tell the jury by what mark or marks you identify that as being Mr. Nixon's dinner bucket?
A. What month?
Q. Pick it up, and just point out to the jury what mark or marks there is on that bucket that makes you confident it is Mr. Nixon's bucket?
A. I don't understand you yet, boss.
Q. I am sorry I don't speak your kind of English, but I will try to make it plain. That bucket is just like scores of buckets of the same kind, isn't it, you could buy a bucket like that anywhere?
A. Oh, yes, sir.
Q. In any hardware store practically, couldn't you?
A. Yes, sir.
Q. And they are as much alike as two peas? Now how can you tell that is the one that was carried by Mr. Nixon?
A. Well, I will tell you, if I just knowed where it is, I just know, you know, that is the bucket, but there is more than one bucket like that too.
Q. Now pick up the other one.

(Witness does so.)

Q. Before I go to that one, though. You said you were well acquainted with Mr. Nixon's dinner bucket. Was there any mark on the lid by which you could tell it was his?
[fol. 176] A. Any mark?
Q. Yes?
A. No, sir.

Q. There wasn't any mark on the lid of Mr. Nixon's dinner bucket?

A. No, sir, not that I know of, there wasn't any mark that I saw on there.

Q. Was there any kind of a mark, was his name scratched for instance, had his name been cut on it?

A. I never seen his name on there?

Q. You can read, can't you?

A. No, sir, not very much.

Q. Mrs. Nixon is going to testify that his name was written, I think by herself, on the top of his dinner bucket?

A. I never did see it.

Q. Then you were not very well acquainted with that bucket?

A. I was acquainted with it, I was there every day, and toted it for him many a day.

Q. Now, that is the milk bucket, isn't it?

A. Yes, sir.

Q. Tell the jury what mark there is on that bucket by which you could identify it as being Mr. Nixon's bucket?

A. What I see you know, I just know it.

Q. But you cannot give any reason for your knowledge?

A. I just know this is the bucket.

Q. You just know it is the one?

A. Yes, sir.

Q. Did the bucket Mr. Nixon had, did it leak at that time?

A. I don't know whether it did, or not. He used to milk in it and I don't suppose it leaked.

Q. You are quite sure that is the one?

A. Yes, sir.

Q. Both of these buckets have been picked up since the last trial or since last October when this case was tried before, and if they were Mr. Nixon's buckets they have been lying in that place for about a year and four months?

By Mr. Long: They were picked up in March of this year.

[fol. 177] By Mr. Drysdale:

Q. Then that was still longer, October, November, December, January, February, and March, five months more, that is when they were picked up, you can stand aside. You can stand aside. Wait a minute, now about the cow, I think you told us that Mr. Nixon had been milking that cow ever since it was brought into the pasture. You told us that, didn't you?

A. Yes.

Q. The cow was brought into the pasture early in the spring, let us call it the first of May, is that about right?

A. In the spring, yes, sir, that is right.

Q. And Mr. Nixon was killed on the 21st of June, wasn't he?

A. Yes, sir.

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Q. And the cow had been milked ever since the cow was put in the pasture by Mr. Nixon and you saw him milking the cow?

A. Yes, sir, he milked it. He didn't milk it when he first put her in there, but he milked her along in May, all right, he started to milk her in May.

Q. Now, honor bright, didn't you tell us in answer to Mr. Long that Mr. Nixon had been milking that cow ever since she was put into the pasture?

A. I couldn't tell you, but he started to milk that cow in May.

Q. What time in May, the first day or the last of May?

A. I couldn't tell you, but he started milking in May.

Q. Maybe he milked the cow in April, or do you know?

A. I don't know.

Q. He had been milking the cow continuously, if it was in May, for a month?

A. He milked in May.

Q. If he started about the last day of May, he would have been milking it for 21 or 22 days at the time of his death?

A. I don't know about the last of May.

Q. Did the cow have a calf when she was put into the pasture?

A. Yes, sir.

Q. She had a calf when she was put into the pasture?

A. Not when she was put in there.

Q. When did she have it?

A. I don't know when it happened. That is what I meant a while ago when he first put her in there, I didn't say what month it [fol. 178] was, but he started milking in May and I was trying to explain that to you?

Q. When was that calf born; was the calf born in May?

A. I think it was born in May, but I don't know what time in May.

Q. He wouldn't have taken the milk until the calf was about ten days old, would he?

A. I don't know, some people milk before that.

Q. We are inquiring what Mr. Nixon did, not what some other people did. That is the best you can tell us about the cow, is it?

A. Sir?

Q. All right. Now you spoke about the mill feed bucket, what did you mean by that?

A. That is the bucket he carried the bran in when he went to milk the cow.

Q. You spoke about a bran bucket and a mill feed bucket. There is a difference between bran and mill feed, isn't there? Bran is bran and mill feed is mill feed.

A. "Bran."

A. It was feed what he gave her to milk her. Some people call it bran and some call it mill feed. Some of them call it that Captain, I don't know what you call it.

Q. What were the two buckets you found near the track when you came back near the place where Mr. Nixon's body was they had been gathered up by the other men, hadn't they?

A. These two buckets?
Q. Yes, on the day Mr. Nixon was killed?
A. The dinner bucket and the bran bucket.
Q. How about the mill feed bucket, where was that?
A. That was the same thing.
Q. The bran bucket seems to have disappeared, or what became of it?
A. I don't know, we used it that day in washing his face off and we left it there and I don't know what became of it.
Q. Just what did Bill Shipman tell Mrs. Nixon about her husband being killed? Tell us again what he said when you got to Mrs. Nixon's house?
A. We went on down there and Bill Shipman told her that Mr. Nixon was up there and he was dead, and she hollered out, "Lord have mercy, what am I to do." She was coming from the house towards us and she told Bill Shipman for to leave somebody there with her, so Bill told Tarleton Fleming to stay there with her.
[fol. 179] Q. Bill Shipman told Mrs. Nixon that her husband had been killed. Bill Shipman did not say how he had been killed to Mrs. Nixon and Mrs. Nixon did not inquire how he had been killed. Is that correct?
A. He said he was dead.
Q. Read the question to him?

(Question read to witness.)

A. Yes, sir.
Q. When you were going towards Mrs. Nixon's house, she was coming towards you?
A. That is right, coming to meet us, you know.

Witness stands aside.

WILLIAM SHIPMAN (col'd) sworn for defendant.

Direct examination.

By Mr. Long:

Q. Your name is William Shipman?
A. Yes, sir.
Q. Where do you live?
A. I live around Midway, near Midway, about two miles from Midway, north.
Q. What is your occupation?
A. Section laborer.
Q. For what railroad?
A. The Chesapeake & Ohio.
Q. How long have you been employed by the Chesapeake & Ohio Railway Company?
A. I have been there ever since before the C. & O. bought, I don't know how long, that is, in the R. & A. time.

Q. In the Richmond & Allegheny time?
A. Yes, sir.
Q. Have you been working all that time as a section man?
A. Yes, sir, working all that time. During my first time I was just working extra, but I have been working just there all of that time.
Q. And you have been there ever since the Chesapeake & Ohio Railway Company owned the railroad?
A. Yes, sir.
Q. Were you working under Mr. Nixon who was killed?
[fol. 180] A. Yes, sir.
Q. At what hour did you go to work, William?
A. Seven o'clock.
Q. Seven o'clock in the morning?
A. Yes, sir.
Q. At what point did you assemble to begin work?
A. At the tool house?
Q. At Midway?
A. Yes, sir.
Q. At what time did you generally get there in the morning?
A. I generally got there from half-past six and from that on to seven o'clock. I have been as late as five minutes to seven, but I always allow myself time.
Q. Do you know what Mr. Nixon's habits were in respect to getting there?
A. He would always generally get there from 25 to between half-past and a quarter to and ten minutes to seven and along like that.
Q. What did he do before the hour of seven o'clock arrived?
A. He had a cow there in Mr. Dunn's pasture and he used to go there and milk and be ready to go out at seven o'clock.
Q. Do you know about what time of the year the cow was put in the pasture?
A. I don't know just what month she was put in there, but it was about the time a cow would feed itself in getting grass.
Q. Along in the spring?
A. Yes, sir, in May or April, or something like that.
Q. Do you know whether or not he was milking the cow during the days just preceding the accident, just before the accident?
A. How long?
Q. How long before the accident was he milking the cow?
A. He milked her on from the time she came fresh until that time on. He would go down there and milk what the calf would leave, you know, she was a mighty good cow.
Q. How old was the calf at the time of the accident?
A. As near as I can get at it between two or three weeks old, or something like that. He had separated it, you know.
Q. He had separated the calf.
A. Yes, sir.
Q. Do you know whether he was taking any milk from the cow at that time?
A. He took it all along from the time the cow came fresh, he took

it all the time because the calf wouldn't take it all and he took it from the cow.

[fol.181] Q. He didn't carry that milk home at first, did he?

A. Yes, sir, he carried it home for the hogs.

Q. He did?

A. Yes, sir, I know that, that is exactly right.

Q. When seven o'clock arrived that morning and Mr. Nixon had not appeared what did the section hands do?

A. We stayed there until about two minutes after seven by the time we had and we set the car on then and went on east to see what was the trouble. We didn't have no orders what to do next morning and we went on down that way.

Q. How did you get the hand car out?

A. We just unlocked the door. The track walker has a key and Mr. Nixon has one and the track walker unlocked the door and we rolled the car out and turned it around and went on east.

Q. Now give the jury an account of what happened as you went on down the track?

A. We pulled the car out and got on it and went on down the track, and we got, down, I don't know just how far, but down at the crossing and there was a little piece of the car, something like that (indicating) that was laying right in the middle of the track. I was pulling in front, and I said, "boys, here is one piece of the car right here," and we went on further and the further we would go, a little more and more of the car we could see until we got down to another crossing there and we could see a little more and more and then we got down where it was scattered around the track, and the little pieces, and then we went on down and after we got down a little further I got down and walked along. I wasn't expecting to find him dead, but I expected to find him hurt or something after I seen the car, and the boys was operating slow behind me and I was walking along over in the weeds, and I went along and I seen him in the weeds, and I said, "here he is boys," and someone said, I don't know which, "is he dead," and he was laying in this direction (indicating) and this arm was down the bank, I disremember whether it was this arm or this one over here, and this arm was being straightened out, and that was all that kept him from rolling down on his back. They said "is he dead," and I stepped over to where I could see and I said, "he certainly is." I put this foot on the bank where I could see over where the weeds was and I said "he certainly is dead." Then I said, "well, I am going to report to Mr. Douglas." I said, "Bill, you and Johnny stay here," and I went on down to Mrs. Nixon's house and she had come down the steps from the porch, from here as far as to that window over there and we stopped the car and I said, "Mrs. [fol. 182] Nixon, Mr. Nixon is up there dead and the car is torn all to pieces," and she said, "Oh Lordy, what am I to do," and then she said, "William, is he dead sure enough," and I said, "yes, ma'am he is sure dead, and I am going to Warminster to report to Mr. Douglas," and she said, "leave someone here with me," and I said, "Tarleton, you stay with Mrs. Nixon," and he did, and I went on and reported to Mr. Douglas.

Q. As you came on down towards Mrs. Nixon's house, you saw her in the yard?

A. Yes, sir, she just had come down the steps and she got as far as from here to that window when we got there.

Q. What did she seem to be doing?

A. She seemed to be walking with her baby in her arms like anyone would walk with a baby.

Q. Did she show any special interest in you all?

A. No, sir. I have seen her walk that way many a time, just like anybody would walk with a baby in her arms.

Q. Then you went on down to Warminster, and did you make a report there?

A. Yes, sir, I reported to the operator and the operator reported to Mr. Douglas and I stayed there until I got instructions and Mr. Horsley went back with us.

Q. Did Mr. Horsley go back with you?

A. Yes, sir, he did.

Q. Then you went back to the scene of the accident?

A. Yes, sir.

Q. What did you do with the body?

A. We taken it up and taken it to the house.

Q. Did you have any conversation with Mrs. Nixon after that time?

A. No, sir, not a word.

Q. What did you find at the scene of the accident besides the body of Mr. Nixon? Did you find anything else at the palce where Mr. Nixon was killed, besides his body?

A. There was some bran in the middle of the track, and this bucket and the bucket he carried his bran in, but this bucket here (indicating) we didn't see that at that time, this large one.

Q. Did you see any other bucket?

A. I saw the bran bucket and this bucket.

Q. What is that bucket?

A. That is the dinner bucket.

Q. Did you afterwards find the milk bucket?

[fol. 183] A. Yes, sir, along during the time we were cutting the right of way. We generally cut the right of way in August, and that is when we found this largest bucket.

Q. Do you recognize these two buckets here as having belonged to Mr. Nixon?

A. Yes, sir.

Q. One is his dinner bucket and the other is the milk bucket?

A. Yes, sir.

Q. Before you went to Warminster, after you had discovered the body, did you call anybody else to come over there where the body was found?

A. Yes, sir.

Q. Who was it?

A. Mr. Desper, he was over there in this direction from me (indicating) and I said, "Mr. Desper, here is Mr. Nixon over here and he

is dead and the car is tore all to pieces," and he said something, but I disremember what he said, anyhow he come on over there and I left him there when I went on to Warminster.

Q. When you came back from Warminister did you find him still there?

A. No, sir, I don't think he was there when I came back.

Q. Do you remember whether anybody else was there?

A. Mrs. Desper was there and her father, Mr. John Powell, he was there when I came back.

Q. What was Mr. Desper doing over in the field when you called him?

A. I disremember whether he had hooked up the horses to cut wheat, but it seems to me at the time that he was looking or greasing his machinery or something when I looked over there, they were all standing around there, but who else was over there, I disremember.

Q. Did you hear that train going by that killed Mr. Nixon or see it?

A. I seen it that morning when I came on. I came by the postoffice and there was a little opening between the mill where I could look through and see, but still I didn't pay any attention to the train because I see them so often, but I just happened to throw my head up and look through that little opening and see this train, still I didn't pay any particular attention to it, you know?

Q. When you came back up there to take up the body of Mr. Nixon was any use made of the bran bucket that you recall?

A. Sir?

Q. Did you make any use of the bran bucket?

[fol. 184] A. I think one of the men went over to the creek and kinda rinsed it out and got water in it and took a rag of some kind and kinda washed the dirt off his face before we taken him to the house.

Q. Do you know what Mr. Nixon did with the milk when he milked his cow?

A. He put it in the tool house and the track walker going west and when he came on down back he would take it on down to his house.

Q. Suppose you were going on past his house on the hand car?

A. He would just take it along himself and put it off.

Q. Was there much passing on that section of the track between Warminster and Midway?

A. Not very much, it is not very thickly settled through there.

Q. Was there any houses along the way or on the railroad between Warminster and Midway except the house Mr. Nixon lived in?

A. No, sir.

Q. What were the instructions given to the men in regard to looking out for trains while at work on the track?

A. What was the instructions?

Q. Yes?

A. To look out all the time and if we see a train coming to set the car off. That is what he told the men.

Q. Did you know that a train might come at any time?
A. Yes, sir.

Cross-examination.

By Mr. Drysdale:

Q. William, just pick up that dinner bucket and show to the jury the mark on it that makes you satisfied it is Mr. Nixon's bucket?
A. I don't know as I can show marks, but it was laying on the bank that morning.
Q. You cannot point to any mark on it by which you could identify it?
A. I would have no personal mark on it.
Q. I am not asking you what mark you had on it, but I am asking what mark, if any, there was on it by which you could identify it?
A. It was a blue enamel bucket, I guess that is what you call it.
[fol. 185] Q. But there are hundreds of blue enamel buckets, similar to that one?
A. Sure.
Q. You couldn't tell two apart unless by some mark on them, all right, now take up the other bucket, is there any mark on that one?
A. No, sir, it is just like the other one, it is just bent up.
Q. And just because it is bent up you recognize it as being Mr. Nixon's.
A. It wasn't there before he was killed, and it has been there ever since.
Q. How do you know that?
A. I didn't see it before.
Q. You didn't see either one until how long?
A. August.
Q. And that is the best way you can tell us. Now you say Mr. Nixon milked his cow and took the milk away immediately after she became fresh?
A. No, sir, I said that he taken it home, and gave it to his hogs, is what he said.
Q. How did he come to talk to you and tell you that he gave it to his hogs?
A. He said so.
Q. How did he come to tell you that?
A. I guess he told all of us, he was just talking like he talked to any other man.
Q. He would go around and tell everybody?
A. No, sir, I didn't say that, just the gang.
Q. He would tell them all what he was doing?
A. I said that he taken it home and gave it to the hogs because the calf didn't take it all.
Q. What did the calf live on in the meantime?

A. The calf couldn't destroy it, he would live on the milk just like you would, if you got more than you could eat, you would leave it.

Q. He didn't take all of it away then?

A. He would take what he milked after the calf sucked.

Q. As a matter of fact the calf was running with the cow and sucking?

A. Part of the time.

Q. What part of the time?

A. Three or four days, or something like that, after she came fresh, and then he put it in a pen.

[fol. 186] Q. When was that cow put in the pasture in that spring—I think you said as early as April?

A. About the time the cow could take care of herself.

Q. As soon as there was sufficient food she was put in there?

A. Yes, sir.

Q. How long after that was it before the calf was born?

A. I don't know, I didn't keep any account of it.

Q. You have no idea how old that calf was at the time Mr. Nixon was killed. We saw it was only two or three days old—do you know what day of the week that calf was born?

A. No, sir.

Q. Do you know what day of the month it was born?

A. No, sir.

Q. Do you know what month it was born?

A. No, sir, I don't know.

Q. You cannot tell us what month it was born in?

A. No, sir, but I know he had separated it and put it in the pen to itself.

Q. When you started out that morning had anything been said by any of the gang about a dinner pail or a bucket top being seen on the pilot of the engine or the train that had passed a short time before?

A. They said they seen a top but didn't say whether it was a dinner pail top or not.

Q. Who said that?

A. I think it was Johnny Rose.

Q. Didn't Johnny Rose say it remembled the top Mr. Nixon had on his dinner pail?

A. I don't think he said particularly whose it was.

Q. Did it occur to anybody to inquire whose bucket top that could be that was on the pilot?

A. I don't know about that now, he just said he *seen* a bucket top, I didn't see it myself.

Q. Isn't it a fact that after it became known among you squad of men that this dinner bucket top was on the pilot of the engine which had just passed, didn't you all suspect that Mr. Nixon had been hurt or killed?

A. How could we expect that, we didn't know who it was.

Q. Never mind how, did you, or not, suspect it?

A. I did not.

Q. When you started out on the car, to look for Mr. Nixon, that is what you did, didn't you?

[fol. 187] A. We started out to see what had happened as he had not come down, because he had been coming there all the time and he hadn't come.

Q. Was anything said about something having happened and that he might have been detained?

A. It might have been, and some of the men said to let us start out and hunt for him.

Q. Where did you look?

A. We looked along on the track.

Q. You were looking on the track and by the side of the track for Mr. Nixon?

A. Yes, after we found the first piece.

Q. We were just going on down the track looking.

Q. Now I took down I think your exact words, but I won't be sure I have them right. You told Mrs. Nixon these words: "Mr. Nixon is dead and the car is torn to pieces." That is what you said, is it?

A. Yes, sir.

Q. That is what you said to her?

A. Yes, sir.

Q. And that is all that was said with respect to Mr. Nixon's death between you and Mrs. Nixon at that time?

A. I told her I was going to Warminster to report it and she told me to leave somebody with her.

Q. Now you said you supposed the cow had been milked for two or three weeks, but you don't really swear positively that the cow had been milked for two or three weeks, do you?

A. I said she had been milked ever since she came fresh.

Q. And she was milked after the time she was fresh and right on from the time she became fresh?

A. I didn't say anything about before.

Q. You said she was milked from the time she came to the pasture?

A. No, sir, I said from the time she came fresh.

Q. Then I beg your pardon, she wasn't being milked when she was put in the pasture?

A. I don't know exactly how long she had been in the pasture or how long she had been dry, but she had been milked from the time she came fresh.

Q. And you do remember she was being milked at the time of the accident?

A. Yes, sir.

[fol. 188] By Mr. Long:

Q. There is one question I omitted. How far was Mr. Nixon's body found from the north rail of the track?

A. The ditch from the rail is seven feet and I didn't take this foot off the top of the bank, but just set this one over the bank like that, and just looked over this way (indicating). I don't know, that is

seven feet, and this would have been just enough to look over the bank, and I suppose when a bank is steep like that a man cannot judge his steps, I don't know, it might have been eight or nine feet as near as I can get at it, the slope of the bank, that bank was steep, you know.

Witness stands aside.

J. W. TURNER, sworn for defendant.

Direct examination.

By Mr. Long:

Q. Will you please state to the jury where you live?
A. I live at Midway Mills, Virginia, Nelson County.
Q. What is your employment?
A. Brakeman.
Q. On the Chesapeake & Ohio Railroad?
A. Yes, sir.
Q. How long have you been employed by the Chesapeake & Ohio?
A. About sixteen years.
Q. Did you know Mr. Nixon who was killed about two years ago, near Midway?
A. Yes, sir.
Q. Do you know anything in respect to his ownership of a cow that was kept in a pasture near Midway at the time of his death?
A. Yes, sir, he owned a cow and kept it in a pasture right at Midway.
Q. Did you know who took care of the cow?
A. Mr. R. A. Dunn.
Q. That is, it was in Mr. Dunn's pasture?
A. Yes, sir.
Q. Who looked after the milking of the cow, do you know that?
[fol. 189] A. Mr. Nixon did the milking.
Q. Did you ever see him milk the cow?
A. Yes, sir.
Q. Up there at the tool house?
A. Up in the pasture.
Q. In the pasture near the tool house?
A. Yes, sir.
Q. What time did you see him doing that?
A. I would see him milking in the evening when he would come in from work.
Q. You would see him milking in the evening?
A. Yes, sir.
Q. You didn't see in the morning?
A. No, sir, I might have seen him but I wouldn't say I seen him in the morning, but about that time I would be doing my own milking around my home.

Q. Did you do your work anywhere near that point or in sight of that point?

A. Yes, sir, in sight of that point.

Q. Do you know anything about the age of the calf at the time Mr. Nixon was killed?

A. The calf was about three weeks old or a little better.

Q. Do you know what became of the cow and calf after Mr. Nixon's death?

A. Yes, sir, I bought the cow and calf myself.

Q. From whom?

A. From Mrs. Nixon.

Q. Within a few days after his death?

A. Yes, sir, he was killed, I think, on the 21st of June, and I bought the cow and calf on the 27th.

Q. You were not there at the time of the accident, were you?

A. No, sir.

Q. You didn't see anything of the accident which resulted in his death?

A. No, sir.

Q. Can you tell the jury whether the railroad between Midway and Warminster is much used by people traveling beiween those points; do many people pass by along the railroad walking between those points?

A. I couldn't say how many, there might be some few, but I have never seen very many, though.

Q. Is there any house along the way except the house Mr. Nixon lived in?

[fol. 190] A. No, not excepting Mr. Dunn, and that is up at Midway, you might say at the station.

Cross-examination.

By Mr. Drysdale:

Q. It is a fact that practically everybody that wants to use that track as a walk-way may do it, isn't it?

A. I don't know about that now.

Q. Did you ever know of anybody being stopped?

A. They had a notice for them to stay off the railroad.

Q. On that particular section?

A. I don't know whether on that particular section or not, but on all sections.

Q. That is what we are talking about. Will you tell this jury that there is a single notice of that kind between Midway and Mr. Nixon's house, or what was his house?

A. I don't know of any notice between there and the house.

Q. As a matter of fact don't you know that there is no such notice?

A. No, sir, I don't know.

Q. You don't know one way or the other?

A. I don't know about right there.

Q. Where is the nearest one that you know of?

A. I don't know of any particular one.

Q. Can you tell of any one within a couple of miles of there, either way?

A. No, sir, I don't know of any one in particular.

Q. You say this cow belonged to Mr. Nixon. Do you know as a matter of fact whether it belonged to him or his wife?

A. I don't know who it belonged to, but I bought the cow after his death.

Q. When you say Mr. Nixon was the owner of the cow you are simply guessing, you don't know?

A. I don't know, but I bought it from her.

Q. You have been a brakeman and you are employed by the Chesapeake & Ohio Railroad and have been for sixteen years?

A. Yes, sir.

Q. And you are still employed by them?

A. Yes, sir.

Q. That takes you away from home a large part of your time, doesn't it?

[fol. 191] A. Yes, sir, it takes me away from home.

Q. And it takes you very largely in the day time, doesn't it?

A. Yes, sir, it takes me away from home in the day time.

Q. Then what goes on on that particular track with respect to people walking on it in the day time, you are not in a position to testify?

A. Not when I am away.

Q. What part of your time would you be in a position to observe who was using that track as a walkway?

A. Any time that I would be at home there.

Q. That is not answering my question. What proportion of your time would you be in a position to see people using the track?

A. Any time when passenger trains arrive there.

Q. I am afraid I don't get you very clearly.

By Mr. Long:

Q. Are you working on a passenger train?

A. No, sir.

By Mr. Drysdale:

Q. I want to know what portion of the time in the day time you are in a position to watch that track and see who used it or how many people used it?

A. I could see the track from my house, I didn't have to go down to the track, I can sit down on my front porch and see the track.

Q. You didn't sit on your front porch all the time you were home, did you?

A. No, sir.

Q. What proportion of your time were you at home?

A. Whenever I would get off the local.

Q. A half or one-third or one-fourth of your time, or what?
A. I guess I stayed home about one-third of my time.
Q. Did you pay particular attention to the track all of that time?
A. No, sir.
Q. You said you never saw Mr. Nixon milk the cow in the morning, as I understood you?
A. I couldn't say I ever seen him milk in the morning, because I wasn't down there at that time. I generally done my own milking at that time.
[fol. 192] Q. And you say the calf was three weeks old at the time of Mr. Nixon's death?
A. I had his word for it.
Q. When did he tell you that?
A. He told me that about the next morning after the calf was born.
Q. He told you it was about three weeks old?
A. No, sir, he told me that the calf was born.
Q. When did he tell you the calf was born?
A. I don't remember what date it was, but it was the latter part of May when it was born.
Q. He told you when it was born?
A. He told me the next morning.
Q. And you cannot tell when that was?
A. I don't know exactly the date.
Q. As a matter of fact there was nothing to call your attention at that time particularly to the age of the calf, was there?
A. He told me the next morning after the calf was born.
Q. Mrs. Nixon has testified that the calf was born on Sunday and her husband was killed the following Tuesday. Will you say that is not true?
A. No, sir, it is not true.
Q. You know that of your own knowledge?
A. Yes, sir.
Q. Then I press you again to tell by what you know?
A. I know that the calf was born in the latter part of May.
Q. The latter part of May?
A. Yes, sir.
Q. What day of the week?
A. I don't know.
Q. Have you any idea of the day of the month?
A. No, sir, I have no idea, but it was just the latter part of May.
Q. What skill have you with respect to judging the age of a calf, by its appearance?
A. I haven't any at all.
Q. None whatever?
A. No, sir.

Witness stands aside.

[fol. 193] MRS. E. G. DESPER sworn for defendant.

Direct examination.

By Mr. Long:

Q. Please state to the jury where you live, Mrs. Desper?

A. I live at Warminster, at least about a mile and a half west of Warminster, between Warminster, and Midway.

Q. Are you in the employment of the Chesapeake & Ohio Railway Company?

A. Yes, sir.

Q. In what capacity?

A. Agent and operator.

Q. At what point?

A. Warminster.

Q. Do you recall being informed of the death of Mr. Nixon who was killed near Midway about two years ago?

A. Yes, sir.

Q. Who brought the information to you?

A. The colored man that we had hired, working for us that day.

Q. About what time of day was it you heard of it?

A. When he came to the house I suppose it was about between seven and eight o'clock.

Q. On receiving the news what did you do?

A. Mr. Desper sent this man to the house after me, and just as soon as I got my car out I went down to the farm bridge and that is as far as I could go in my car and then I walked up the track to where Mr. Nixon was.

Q. Do you recall who was there with the body?

A. William Venable and John Rose were the two I remember being there at the time.

Q. What did you do?

A. I called to John Rose just a few steps before I got to him and asked him if Mr. Nixon was dead and he said yes, he was, and then I went up to him and saw that he was dead.

Q. About how far was he lying from the north rail of the track?

A. I suppose it would be about three feet or something like that, maybe three or four feet, four feet, I expect.

Q. Was he on the slope of the bank?

A. Yes, sir, kinda side-ways of the bank.

Q. And between him and the track was a pathway?

[fol. 194] A. Yes, sir.

Q. What did you next do?

A. I saw there wasn't anything I could do except I suggested to get an umbrella and put over his head and face and I went to Mrs. Nixon's house and got the umbrella.

Q. From whom did you get the umbrella, do you recall?

A. The colored girl got the umbrella and give it to me.

Q. While you were there did you have any conversation with Mrs. Nixon?

A. Yes, sir, Mrs. Nixon and I had a little conversation.

Q. Please state what was said in that conversation as nearly as you can recall?

A. Mrs. Nixon told me that she heard this train coming and she went out on the porch to see if she could see Mr. Nixon get off the track and after she got out on the porch she couldn't see him get off the track and she went in the yard on the ground to see if she could still see him get off and she said she did not see him get off the track and she then went back in the house and told this colored girl, Essie, that was staying with her, she did not see Sam get off the track, but she supposed he surely did, that surely he had sense enough to get off the track.

Q. She was sure he had sense enough to get off the track?

A. Yes, sir.

Q. She did not claim to have seen him struck by the train?

A. She didn't tell me she did.

Q. Did you ever have any other conversation with her about the accident?

A. No, sir.

Q. And after having gotten the umbrella, what did you do?

A. I took it and carried it up to where Mr. Nixon was and I went on the lower side of him, he was laying in the weeds and William Venable was on the upper side of him and he and I fixed the umbrella, pulled the weeds back a little bit so that we could set the umbrella there.

Q. Were you at that place when the men came back from Warminster?

A. I think I was.

Q. Do you recall who was with them, or if they brought anybody back with them from Warminster?

A. They brought Mr. E. E. Horsley back.

Q. What was then done with the body?

[fol. 195] A. They picked the body up and put it on the lever car and took it down to his house.

Q. Was anything done to the body while it was there, after it was put on the car?

A. Someone got some water and washed his face. I think I was the one that suggested "let's wash his face, a little bit, and his head before we take him to the house."

Q. What did they bring the water in?

A. In a tin bucket. I saw a tin bucket setting on the ground and I saw it had some water in it and it looked like it was trashy and I threw it out and one of the men said that was water they brought to wash him off with, and I told him I begged their pardon that I did not intend to throw it out, but I wanted to get some clean water.

Q. What sort of trash appeared to be in the bucket?

A. I don't know, but it was something.

Q. Did you see any other bucket there at the time?

A. I don't remember seeing any other bucket.

Q. You stated, I believe, you didn't see Mrs. Nixon again after this?

A. I didn't go back to the house with the body, I went as far as the bridge and then I went home.

Q. And you had no conversation with her afterwards about the accident?

A. No, sir.

Q. Did you see the train go by that morning?

A. Yes, sir, I was at my home about three-quarters of a mile from the track and I heard this train coming, and I was off duty that day and was at home and I heard this train coming and it was running like it wasn't a full train, running kinda light and I looked out of the window to see what it was, if it was a regular train or what it was and I only saw it as it was passing the house and I didn't pay any more attention to it.

Q. At what point on the track did you see the train?

A. It was about passing the bridge, or a little west of the bridge. My house is just opposite the bridge.

Q. You mean a little west of Mrs. Nixon's house?

A. A little west of the bridge. This farm bridge is west of Mrs. Nixon's house, the one I am speaking of?

Q. Was it at a point west or east of Mrs. Nixon's house?

A. It was west.

Q. You heard it before you looked out though?

[fol. 196] A. Yes, sir.

Q. Do you know whether or not the railroad track between Warminster and Midway is used to any extent by people walking between those points?

A. Not so much, mighty little bit as far as I know.

Q. Can you observe the track between those points or did you have an opportunity to observe it?

A. All of it?

Q. Yes?

A. From Warminster to Midway?

Q. Yes?

A. I suppose I could. I might miss it a little bit.

Q. Can you see the track from your house?

A. Yes, sir, plainly.

Q. Pretty nearly the whole way?

A. No, sir, not the whole way, I suppose I can see three or four miles.

Q. And is there any house on or near the track except the house that the Nixon's occupied?

A. No, sir, not until you get to Midway.

Q. Mrs. Desper, were you present when a test was made some weeks ago or a month ago to ascertain whether or not the scene of the accident was visible from the front porch of the Nixon house?

A. Yes, sir, I was there.

Q. Can you explain to the jury please how this test was made?

A. We were on the front porch of Mrs. Nixon's house when an east-bound train came and there is a curve in this track just west of Mrs. Nixon's house, where Mr. Nixon was killed it was a straight track and a freight train was coming east and this train struck the

straight line first and as soon as it struck the curve then we couldn't see the track, we couldn't see a man standing by the side of the track.

Q. You mean where the accident happened?

A. Yes, sir.

Q. With that train coming east and you standing on the front porch and looking up to the scene of the accident you couldn't see the scene of the accident?

A. No, sir.

Q. You could not see a man standing there on the north side of the track?

A. I could not, no, sir.

Q. Who was standing there, do you recall?

A. One of the section men, I think it was William Venable, I [fol. 197] couldn't see him. He moved off the track then on the bank a little bit.

Q. Was any other test made as to the visibility of that point?

A. Yes, sir, Mr. Dunn was there and he went opposite where Mr. Nixon was killed and he went across the canal and over on the bank some little distance, and he went to a point I suppose somewhere between thirty and thirty-five feet before we could see him across the canal.

Q. Was there a test made there with a train going westward just as the train was going that killed Mr. Nixon?

A. Yes, sir.

Q. Explain what that test was to the jury?

A. That train going west would strike the curve before they would the straight line and we still couldn't see this man on the track when the west-bound train passed.

Q. Was any man put on the track in front of this train?

A. Yes, sir.

Q. Who was it?

A. William Venable, he was on a velocipede and he was put on the track just ahead of this train and it ran very slowly from there to where Mr. Nixon was killed.

Q. And the train ran slowly behind him?

A. Yes, sir.

Q. Where were you standing at that time?

A. On the front porch.

Q. Looking from the front porch and watching that train going westward with William Venable on a velocipede in front of it, could you see William Venable?

A. No, sir.

Q. How far did he go before he stopped?

A. Before who stopped?

Q. William Venable?

A. Venable went up to about where Mr. Nixon was killed.

Q. Did he get off there?

A. Yes, sir.

Q. Did he take the velocipede off there?

A. Yes, sir.

Q. And the train was still moving up there in that direction?
A. Yes, sir.
Q. Could you see him after he got off the atrack?
A. No, sir.
Q. And had taken the velocipede off?
A. No, sir.
[fol. 198] Q. On which side of the track did he get off on?
A. On the north side.
Q. When the train passed you could then see him, could you?
A. Yes, sir, after the train passed we could see him.
Q. And he was standing at the north side by the track at the scene of the accident?
A. Yes, sir.
Q. And until the train had gotten clear by you couldn't see him?
A. You couldn't see him until after the caboose passed?
Q. You don't know anything about Mrs. Nixon's cow, do you?
A. No, sir. I know she had one and that is all I knew.

Cross-examination.

By Mr. Drysdale:

Q. Mrs. Desper, if I understand you correctly William Venable got on a velocipede in front of this train which was moving very slowly westward?
A. Yes, sir.
Q. And he got off at or near the spot where Mr. Nixon was killed?
A. Yes, sir.
Q. The train never hit him?
A. No, sir.
Q. You didn't put a man on a velocipede and let the train hit him, the train going at leat 25 miles an hour, to see how far it would have thrown him, did you?
A. No, sir.
Q. You say Mr. Nixon would have to have been thrown 30 or 35 feet before he could have been seen from the porch?
A. From that point, yes, sir.
Q. The engineers have testified that he could have been seen in 18 feet. Now which is correct, you or the engineers?
A. I don't know, I never measured it, I said I supposed between 30 and 35 feet.
Q. You don't swear to the correctness of that?
A. No, sir.
Q. When you called on Mrs. Nixon it was very soon after her husband had been killed, or between eight and nine o'clock in the morning?
A. Yes, sir.
[fol. 199] Q. How near eight o'clock was it, if you can tell us?
A. I don't know, I don't remember.

Q. Any way, as soon as you got the news you got your car out and went up there, I suppose, and saw Mrs. Nixon?

A. Yes, sir.

Q. She was very much agitated, wasn't she?

A. Yes, sir, very much distressed.

Q. Was she really in possession of her faculties; did she talk coherently or incorherently?

A. She seemed to be talking like she knew everything. She was all right, except she was very much distressed.

Q. And she told you she went on the ground.

A. She told me she went up on the porch to see if she could see Mr. Nixon get off the track and she couldn't see him get off the track, and then she went down on the ground in the yard to see if he got off.

Q. That would have lessened her visibility rather than increase it?

A. No, sir, she couldn't see him any further from the ground.

Q. She couldn't see him as well, could she?

A. No, sir, I don't suppose she could.

Q. You didn't ask her about that?

A. No, sir, but I suppose she wanted to get a better view.

Q. If she wanted to do that she would have to go to a better point of vantage?

A. Yes, sir.

Q. She told you that she told Essie, the colored girl, what?

A. She told Essie she didn't see Mr. Nixon get off the track.

Q. She didn't say anything about having seen him thrown off?

A. No, sir.

Q. Now with respect to the use of the track between Mrs. Nixon's house and Midway, isn't it a fact that anyone that wants to use that track as a walkway may do so?

A. They can and they do use it.

Q. Everybody that wants to use it uses it?

A. Everybody that wants to go up and down the track, they do it.

Q. Walking the track to a great many points is much shorter?

A. Yes, sir, much shorter than the county road.

Q. For example, Mr. Nixon's house around the county road would be about two miles and up the track about a mile and a quarter?

A. I suppose, or maybe a mile and a half.

[fol. 200] Q. As a matter of fact there is a well-defined walkway on each side of that track, isn't there?

A. Yes, sir.

Q. Made by pedestrians passing along there?

A. A very good walk.

Q. Now you say you got that umbrella from Essie, the colored girl?

A. Yes, sir.

Q. Do you know to whom it belonged?

A. No, sir, I don't. I was just an umbrella at the house, but I don't know whose it was.

By Mr. Long:

Q. With reference to the walk alongside the railroad, on either side of it, do you know whether that well-defined walkway you speak of is made by the railroad men working on the track or made by pedestrians passing back and forth?

A. It is made by the railroad section men and it has to be kept in good order all the time.

Q. Do you know whether it is required to be kept clean?

A. Yes, sir, they are required to keep it clean all the time.

Q. With respect to the distance going from Warminster to Midway, is it a shorter distance to go by the railroad or by the county road?

A. It is a shorter way to go by the road and pass through the field. The county road, I don't think, is any nearer, but there is paths across the field that people go sometimes and that is nearer.

Q. There is a nearer way by the county road and pathways across the fields?

A. Yes, sir, the pathway across the field, that is nearer, but I don't think the county road is any nearer, it might be a mighty little bit.

Q. Did you ever make use, yourself, of the roadway in going from Warminster to your house?

A. This track?

Q. Yes?

A. I very seldom ever go that way. I have ridden horseback down this track from my house to Midway, all the way to Midway

Q. What is your customary way of going?

A. The nearest way for me is the county road.

[fol. 201] Q. You have had an opportunity to observe whether pedestrians frequently pass that way, or not, haven't you?

A. Yes, sir, but there is not so much passing.

Q. Not so much passing?

A. No, sir.

By Mr. Drysdale:

Q. Your duties as an operator keep you at Warminster Depot practically all day, don't they?

A. Eight hours.

Q. From when to when?

A. From seven o'clock in the morning to three in the evening.

Q. And during that time of course you are not able to observe the track we have been speaking of?

A. No, sir, not for those eight hours.

Q. There is just one thing I forgot to ask you before. You testified I think that the body was lying three or four feet from the north rail?

A. Something like that.

Q. One of the section men said from the rail to the bank is supposed to be seven feet and the body was lying on the bank some little distance. That would make it eight or ten feet, wouldn't it?

A. If he said it was ten feet——

Q. No, pardon me, I think he said that from the rail to the edge of the bank is supposed to be seven feet and the railroad there is built up and the bank slopes down and it was down that slope some?

A. Yes, sir, a little bit.

By Mr. Long:

Q. You saw the place where the body was lying?

A. Yes, sir.

Q. And the test that was made when you were standing on the porch, could you have seen that place with a train between you?

A. No, sir.

Witness stands aside.

[fol. 202] J. R. DESPER sworn for defendant.

Direct examination.

By Mr. Long:

Q. Where do you live?

A. Warminster.

Q. Are you the husband of Mrs. Desper who has just testified?

A. Yes, sir.

Q. Are you employed by the Chesapeake & Ohio Railway Company?

A. Yes, sir.

Q. In what capacity?

A. Brakeman.

Q. And where do you operate?

A. Between Gladstone and Balcony Falls.

Q. You operate westward from Gladstone?

A. Yes, sir.

Q. Were you at home the morning that Mr. Nixon was killed?

A. Yes, sir.

Q. And near the scene of the accident?

A. Yes, sir.

Q. It has been stated that you were called by the section men. Is that true?

A. Yes, sir.

Q. And what did you do?

A. I went down to where the section men were.

Q. Did you see the body of Mr. Nixon?

A. Yes, sir.

Q. How far was it lying from the north rail of the track?

A. I suppose some four or five feet, or something like that.

Q. Was it on the slope of the embankment?

A. Yes, sir, just on the slope of the bank.

Q. You saw nothing of the accident, did you?
A. No, sir.
Q. Did you hear the train pass by that morning?
A. Yes, sir.
Q. Where were you at that time?
A. I was about half a mile from where the accident occurred.
Q. At your house?
A. No, sir, going to my work.
[fol. 203] Q. Did you actually see the train or only hear it?
A. I saw it.
Q. Whereabouts did you see it, at what point?
A. It was pretty close to where this accident occurred.
Q. Did you have anything to do with the care of the body and disposition of the body after you went over there?
A. No, sir, I told one of my men to go to the house and get my wife to come down.
Q. You stayed until she arrived?
A. No, sir, I stayed there just a few minutes.
Q. Did you observe any buckets near the body?
A. I cannot recall that I did.
Q. You didn't notice that particularly?
A. No, sir.
Q. Were you present when a test was made some weeks ago to determine whether or not the scene of the accident was visible from the front porch of the Nixon house?
A. Yes, sir.
Q. Where were you standing?
A. I was standing on the porch.
Q. How was the test made?
A. There was a train coming from Midway and we went down to the house where Mr. Nixon lived and several of us stood on the porch until this train came by and Mr. Dunn stayed up there and we couldn't see him after the train got on the curve.
Q. Where was Mr. Dunn stationed?
A. He was right at the place where the accident occurred and he walked over so we could see him, way out in the field, across the old canal.
Q. Did he walk clear across the canal before you could see him?
A. Yes, sir.
Q. Was this train moving east then?
A. Yes, sir.
Q. Coming down from Midway?
A. Yes, sir.
Q. And as that train passed along down the track coming towards you, you couldn't see Mr. Dunn, who was stationed at the scene of the accident?
A. No, sir.
Q. You could not see him until he moved across the canal?
A. That is right.
[fol. 204] Q. Was a test made in any other way with a train going west?

A. Yes, sir, he put William Venable on this velocipede and flagged a train there and William moved off on this velocipede and the train followed him and we stood on the porch then and after the train got on that track we could not see him any more.

Q. You mean got around the curve to the straight track?

A. Yes, sir.

Q. You couldn't see him at all?

A. No, sir.

Q. When the train had passed beyond the scene of the accident did you see William Venable then?

A. After the train had gone?

Q. After it had gone beyond?

A. Yes, sir.

Q. Where was he standing when you first saw him?

A. He was standing pretty close or I suppose right where the accident occurred.

Q. What had he done with the velocipede?

A. He took it off the track.

Q. He was standing on the north side of the track with the velicipede at about the point where the accident occurred?

A. Yes, sir.

Q. You didn't see him and could not see him until the train had gotten clear by?

A. No, sir.

Q. Did you know anything about Mr. Nixon's cow?

A. I cannot say that I did, except that we kept his cow in Mr. Dunn's pasture.

Q. You don't know who milked the cow?

A. No, sir.

Q. You merely saw the cow up there in the pasture?

A. Yes, sir, I have seen it up there a good many times.

Q. You are familiar with the railway track between Midway and Warminster?

A. Yes, sir.

Q. It is used by pedestrians to any great extent as a passageway?

A. No, sir, I cannot say that it is. Some days you will see probably one man or probably two and it will be a week before you will see anybody else.

Q. It has been testified that there is a pathway on either side of the track. Do you know how that pathway comes to be there? Is that made by pedestrians or by the railroad men?

[fol. 205] A. It is made by the railroad men as far as I know.

Q. Did you ever have any conversation with Mrs. Nixon after the accident?

A. No, sir.

Cross-examination.

By Mr. Drysdale:

Q. Mr. Nixon had lived in that house for something like a year, possible a little more than a year prior to his death, hadn't he?

A. Yes, sir, he had been living there some time, but I couldn't tell you exactly how long.

Q. How many did Mr. Nixon have in his family, can you recall?

A. His wife and four children, I think.

Q. And they usually kept a colored girl, didn't they?

A. Yes, sir.

Q. The market for those people would be Midway, that is the nearest place, isn't it?

A. Yes, sir, I guess that is the nearest store.

Q. What was the nearest way from there to Midway to buy thier groceries, for example?

A. That would depend on which way you were travelling.

Q. Would the nearest way be along the railway track or along the county road?

A. The nearest way is up the railroad track.

Q. In other words, it is just about half the distance by the railroad track, isn't it?

A. Yes, sir.

Q. And anybody going to see Mr. Nixon either for pleasure or on business would use that walkway, wouldn't they?

A. I cannot say that.

Q. Can you say they wouldn't use it?

A. It just depends where they are coming from.

Q. I mean coming from Midway.

A. If he was walking, I suppose he would walk down the railroad track.

Q. There was no objection to that, was there, by anybody?

A. None as I know of.

Q. As a matter of fact, anybody who wants to use that as a walkway may use it and the railroad officials never objected, did they? [fol. 206] A. No, not as I know of.

Q. As a matter of fact, the railroad men do not make that path along the track with their feet, they ride on a car going to and from their work, don't they?

A. Yes, sir.

Q. Wasn't that path mostly made by people just walking along, the same as any other path made at any other place?

A. Yes, I think so.

Q. When these tests, you have been speaking of, were made, was there anybody present except agents and employes of the Chesapeake & Ohio Railway Company?

A. No, sir, I don't think there was.

Q. Do you know whether or not any notification had been given to Mrs Nixon or myself representing her that those tests were going to be made and inviting us to be present and have professional men there?

A. I don't understand you.

Q. Do you know whether any notification was given to Mrs. Nixon——

By Mr. Williams: There was not. I can answer that, Mr. Drysdale.

By Mr. Drysdale: We never heard of it until we came into court.

By Mr. Williams: That is right.

By Mr. Drysdale:

Q. You say the body was lying about four or five feet from the nearest rail?

A. Yes, sir.

Q. One of the track men, who I presume knows, says that the distance from the edge of the bank to the nearest rail will be seven feet, down the slope a*on*ther foot or two and of course that would make it nine or ten feet, as the case might be. Do you think you are correct in your estimate of four or five feet?

A. Yes, sir, I think I am correct.

Q. Is that a mere estimate or did you measure it accurately?

A. No, sir, only an estimate.

Q. That is simply an estimate?

[fol. 207] A. Yes, sir.

Q. In other words, that is a guess?

A. Yes, sir.

Q. You have been working for the Chesapeake & Ohio Railway Company for how long?

A. Eighteen years.

Q. And you are still working for them?

A. Yes, sir.

Q. You say you cannot recall seeing any buckets where the body was?

A. No, sir.

Q. And luckily you don't know anything about the cow?

A. No, sir.

Q. Except that it was kept in Mr. Dunn's pasture?

A. Yes, sir.

By Mr. Williams: Mr. Drysdale, you referred a little while ago to giving you or Mrs. Nixon notice that we were going to make these tests and I just want to state that we gave you no notice by reason of the fact you had made your own observations there before and said nothing to us about it.

By Mr. Drysdale: I had a map drawn and measurements made, and that is all.

Witness stands aside.

R. A. DUNN, sworn for defendant.

Direct examination.

By Mr. Long:

Q. Have you been sworn?
A. Yes, sir, on yesterday.
Q. Where do you live?
A. Midway Mills, C. & O. Division.
Q. What is your occupation?
A. Farming.
Q. It has appeared in evidence here that Mr. Nixon, who was killed about two years ago near Midway, had a cow which was kept in Mr. Dunn's pasture. Was that your pasture?
[fol. 208] A. Yes, sir.
Q. Do you know anything about Mr. Nixon's practice in respect to milking that cow? Did that come under your observation at all?
A. I know he milked it in the afternoon at times.
Q. You saw him in the afternoon at times?
A. Yes, sir.
Q. You didn't see him in the morning?
A. No, sir, I am usually engaged in my own farming operations at that time of day.
Q. Do you remember that the cow was fresh at the time of the accident?
A. It had been fresh.
Q. Do you know anything about the age of the calf at the time of his death?
A. As well as I can remember the calf was born late in May or the early part of June.
Q. And do you know at what time the cow was put in your pasture?
A. May 1, 1921.
Q. Did you have any occasion to know when this calf was born or do you know anything about it?
A. I knew he told me the cow was fresh, but I cannot exactly recall the exact date, but I know it was late May or early June, it couldn't vary more than ten days.
Q. He mentioned it to you at the birth of the calf?
A. Yes, sir, he told me the cow was fresh.
Q. Did you see the calf afterwards?
A. Yes, sir.
Q. Do you recall whether or not Mr. Nixon said anything to you about separating the calf from the cow?
A. Yes, he asked permission to build a little cupping there and keep it there.
Q. And that cupping was built there after the calf was born?
A. Yes, sir.
Q. And used to separate the calf from the cow?
A. Yes, sir.

Q. Did you see the calf after the death of Mr. Nixon?
A. Yes, sir, several times.
Q. Or about the time of his death?
A. I think I saw it that day. I was down there, but I cannot swear to that.
[fol. 209] Q. Could you judge by the appearance of the calf about what its age was?
A. No, I don't think you can tell very much about the difference of a week or ten days, a calf running on pasture that way, unless it has been forced.
Q. But your recollection is that about the last of May or first of June he mentioned to you the birth of the calf?
A. Late May or early June.
Q. Did you see anything of the accident?
A. No, sir.
Q. You know nothing about the circumstances then?
A. No, sir. I was lazy that morning and was laying in bed and hadn't gotten up.
Q. You didn't have any conversation afterwards with Mrs. Nixon?
A. No, sir.
Q. And you know nothing about the accident?
A. I know nothing about the accident.

Cross-examination.

By Mr. Drysdale:

Q. How long had Mr. Nixon rented that pasture from you?
A. Off and on for—I don't recall—but one or two years. He would take it out in the fall and put it back in the spring.
Q. He had rented the pasture from you the previous year, during the season of 1920?
A. Yes, sir.
Q. And then he got it in 1921 again?
A. Yes, sir.
Q. You didn't testify at the last trial, did you?
A. No, I was not here.
Q. When was your attention first drawn to the materiality of the age of that calf, when were you first spoken to about it?
A. About the age of the calf?
Q. Yes?
A. I think that Mr. Long asked me just now, as well as I can remember.
Q. And you have never spoken of it to anyone before—didn't any representative of the railway company call on you to find out what you knew about the age of the calf?
[fol. 210] A. He asked me about the cow being in the pasture?
Q. When was that?
A. It was some time in the winter.
Q. In the winter just passed?
A. Yes, sir.

Q. And nothing was said about the age of the calf at that time?

A. Not that I can recall.

Q. Will you tell the jury why you are so positive that the calf was born in late May or early June, when it is more than two years gone by and there was nothing to call your attention to it until that moment on the witness stand?

A. My memory, that is all I can say.

Q. You are perfectly positive you are right?

A. As positive as a human being can be.

Q. And you had not considered the matter at all until you were asked the question just a moment ago by Mr. Long?

A. Having no reason for it, why should I?

Q. I am not here to answer your questions, but you are here to answer mine.

A. I beg your pardon.

Q. My opinion does not affect it one way or the other. Understand I am not trying to insinuate that you are not telling the truth, but I simply want the jury to know what opportunities you had of estimating correctly, that is all. Now if Mrs. Nixon would say, as she already said on the witness stand under oath, that that calf was born on Sunday and her husband was killed the following Tuesday, would you say that statement is not true?

A. I think Mrs. Nixon must be mistaken about the dates.

Q. Will you swear positively she is mistaken?

A. I could swear that the cupping was built before that.

Q. The cupping might have been built in anticipation of the calf, might it not?

A. It is possible.

Q. Now you spoke about the calf running in the pasture. As a matter of fact when Mr. Nixon was killed that calf was running with the cow in the pasture, was it not?

A. It was in the cupping.

Q. Then why did you speak of the calf running in the pasture?

A. Who?

Q. Yes, you said that a minute ago when Mr. Long asked you about the age of the calf, you said you couldn't very well tell the age [fol. 211] of a calf running in the pasture unless it had been forced. Explain to the jury what you meant?

A. We nearly always put a calf in the cupping and keep them separate from the cow that is being milked.

Q. Mrs. Nixon has already testified that the calf run with the cow from the moment of its birth until her husband was killed, or after her husband was killed either. You say that is not true?

A. Yes, sir.

Q. You will say that positively?

A. Yes, sir.

Q. What occasion had you for observing whether that calf was in the cupping or was running with the cow?

A. I went to the station every day and passed the cupping and saw the calf there.

Q. Every day?
A. Yes, sir.
Q. Why would you have taken such particular notice of it? You didn't know that any question was going to arise about the age of the calf at that time, did you?
A. I just saw the calf and I suppose it made a mental impression on me.
Q. That is the best you can tell me? All right—you never saw Mr. Nixon milk his cow in the morning?
A. Except Sunday morning.
Q. Where were you usually about seven o'clock in the morning?
A. I was usually within 200 yards of my dwelling house, either in front or back.
Q. Was that in sight of the place where Mr. Nixon usually milked the cow?
A. It would be if I was in the extreme part of my front yard.
Q. If Mr. Nixon had been in the habit of milking his cow at this particular place every morning between the hours of half-past six and seven o'clock you would have known it, wouldn't you?
A. I wouldn't have seen it.
Q. Would you have any other occasion to gain knowledge of his habit?
A. No, not unless I asked the men that drove my cows up, I would not.

Witness stands aside.

[fol. 212] A. N. RAGLAND sworn for defendant.

Direct examination.

By Mr. Long:

Q. Where do you live?
A. Warminster.
Q. What is your occupation.
A. Farmer.
Q. Did you hear of the accident that resulted in the death of Mr. Nixon about the time or shorty after the accident occurred?
A. I did, about nine o'clock, I suppose.
Q. Were you at Warminster at the time?
A. No, sir, I was below Warminster about a mile.
Q. What were you doing that morning?
A. Cutting wheat.
Q. Who was helping you?
A. Mr. Jim Cunningham.
Q. He is one of the witnesses who has testified in this case?
A. Yes, sir.
Q. Did you go up to the scene of the accident that morning?
A. Yes, sir.
Q. What was your reason for going up there?

A. Some boy or another came and told us that Mr. Nixon was killed and me and Mr. Cunningham finished up a little piece of wheat we had and went straight up there.

Q. Had his body been moved then?

A. Yes, sir.

Q. Did you make any observations at the scene of the accident?

A. Not particular.

Q. Did you find anything there, any traces of the accident?

A. I seen the broken car and two buckets, I think.

Q. Did you see any bran on the track?

A. Yes, sir, I seen some bran on the track.

Q. I suppose you were not familiar with these buckets and had never seen them before, I imagine?

A. I might have seen them, but I wouldn't say.

Q. Were you acquainted with Mr. Nixon?

A. Yes, sir, very well.

Q. Do you know anything about Mr. Nixon's cow?

A. I don't know anything about her.

[fol. 213] Q. Do you know that he had a cow?

A. Yes, sir, I know he had a cow.

Q. Do you know where the cow was kept?

A. It was kept in Mr. Dunn's pasture.

Q. Do you know anything about who milked the cow?

A. I don't know who milked her every day, but I have seen him milking her and he told me he milked the cow.

Q. Did you have any conversation with Mrs. Nixon after the accident?

A. No, sir, none at all.

Q. Are you familiar with the track between Warminster and Midway?

A. Yes, sir, I have been living around there for *tne* or twelve years.

Q. Do you know to what extent it is used by pedestrians going back and forth along that section of the country?

A. Very few people use it, now and then some use it, but not as a regular thing.

Q. You mentioned something that Mr. Nixon said to you, I believe, with reference to the cow. Can you tell a little more fully what that was?

A. I was plowing some corn down there on the side of the track one day and he walked to where I was and he was telling me that the cow was fresh and that he still had her in pasture and he went up in the morning and milked the cow and sent it down in the morning by the track walker and brought it back in the evening himself.

Q. He told you that?

A. Yes, sir.

Q. Did you ever see that calf?

A. I have seen it after he was killed.

Q. You don't know anything about the age of the calf at the time of his death?

A. No, sir.

Cross-examination.

By Mr. Drysdale:

Q. When was it that Mr. Nixon told you about this fresh cow?

A. I suppose it was—I didn't keep up with the date, but it might have been two weeks before he was killed, or something like that.

[fol. 214] Q. It might have been two weeks or two days?

A. It was more than two days.

Q. Why are you so positive about *that*?

A. Two days, I never thought of it again.

Q. You wouldn't have thought of it again, if he had told you two days before his death?

A. I don't know exactly how many days, I didn't keep up with the time.

Q. In other words, what you are telling now is more or less of a guess?

A. No guess at all, he told me that. I mean I am guessing at the time.

Q. Understand me, I am not trying to say you are telling what is not true, but I want the jury to understand whether or not you are correct in your guess or estimate.

A. I couldn't tell you exactly how many days.

Q. You couldn't tell how many days it was?

A. No, sir.

Q. Now with respect to the people using the track from Mr. Nixon's house to Midway, what opportunities had you for observing how many people used that particular portion of that track?

A. There is very few people there.

Q. That is not answering my question, I am asking you what were your opportunities of observing how many people used that track between Mr. Nixon's house and Midway and vice versa?

A. I live there, you might say, in sight of the track and have been there for six years, right about the section house.

Q. When did you cease to live there?

A. About seven years.

Q. You ceased to live there?

A. Yes, sir, but I lived right around there.

Q. For the last six years you haven't lived within sight of that place?

A. Not in sight of the track, no more than passing there.

Q. Six or seven years ago when you lived there, that house was not occupied, was it?

A. Yes, sir, part of the time it was and part of the time it wasn't.

Q. Isn't it a fact that for some time before Mr. Nixon moved in there the house had been out of repair and not occupied by anybody and then it was repaired and Mr. Nixon lived in it.

A. Yes, sir, a colored fellow lived in there before that for a while.

[fol. 215] Q. When did you say you heard of the accident?

A. The same day about nine o'clock.

Q. Where were you at about between half-past six and seven?

A. I was standing on the porch at home about 300 yards from the track, about a mile below Warminster.

Q. Do you recall that there was any wind blowing that morning?

A. If there was any blowing that morning, I didn't know it. I saw the train go up and heard it.

Q. Do you recollect whether the wind was blowing at that time?

A. There was no wind blowing to my knowing.

Q. There was nothing to draw your attention to whether or not there was any wind?

A. No, sir.

Q. You were some distance from the scene of the accident at that time, weren't you?

A. Yes, sir.

Q. How many miles?

A. A mile I suppose, maybe a little more than a mile.

Witness stands aside.

Court takes a recess until two o'clock P. M.

Friday Afternoon, June 8, 1923.

Continuation of Evidence on Behalf of Defendant

V. T. Douglas sworn for defendant.

Direct examination.

By Mr. Long:

Q. Are you in the employment of the Chesapeake & Ohio Railway Company?

A. Yes, sir.

Q. In what capacity?

A. Supervisor of Track.

Q. How far does your jurisdiction over the tracks extend?

A. Between Richmond and Gladstone.

Q. Does the employment or control or instruction of the section or maintenance of way men come under your supervision?

[fol. 216] A. Yes, sir.

Q. Was Mr. Nixon employed by you or by your sub agent?

A. Yes, sir.

Q. Did you ever have any conversation with Mr. Nixon about his work?

A. In what respect?

Q. In any respect; did he ever make any application to you?

A. He was foreman when I took charge of the district.

Q. He was already foreman?

A. Yes, sir.

Q. And he did not owe his appointment to you, but you kept him under your term?

A. Yes, sir.

Q. He held over under your jurisdiction?

A. Yes, sir.

Q. What application did he make to you after you were appointed as Supervisor of Tracks?

A. What application did he make to me?

Q Yes, did he make any request of you or application to you in respect to the use of the velocipede?

A. We were rebuilding a house about one mile from Midway at the old canal locks and while that house was being rebuilt he asked permission to use the velocipede in going to and from the tool house, which is at Midway.

Q. That application was made in anticipation of his going down to the house to live in that old lock house?

A. To go to and from the section house or tool house.

Q. He expected to live in the section house?

A. Yes, sir.

Q. Do you know anything about his use of the velocipede prior to that time?

A. No, sir, other than his regular duties, in going over the track.

Q. Will you please state what instructions are given to the maintenance of way men, the section men and foremen and section hands in respect to taking care of themselves in the course of their work?

A. They are expected to look out for trains at all times. They have no way of finding out or communicating with the telegraph operator whereby they might obtain information, therefore it is necessary that they rely strictly on their watchfulness in looking out for trains.

[fol. 217] Q. Please state to the jury whether the nature of their employment is such that they necessarily have to depend principally on themselves rather than on the operating crews for their protection and safety?

A. It is absolutely necessary that they depend entirely on their watchfulness. The trains have no way of knowing just where they will be, therefore it is necessary that the section foreman or section men look out for themselves at all times, that is the general rule.

Q. What duties do they have, if any, to give notice to the trains operating over the track of conditions making it necessary for the train to be either stopped or operated slowly over the track?

A. It is necessary to place their proper signals, which is a red flag and torpedoes in charge of a man going back a proper distance to flag the train and stop the train and tell the engineer what is wanted.

Q. They owe then the duty of giving proper signals to the trains operating over the track so that the trains themselves may be protected against obstructions on the track?

A. That is correct.

Q. Is it possible for the general officers of the railroad to give instructions to the operating crews in respect to their specific duties, as to section men working on the track. I mean can they give any specific rules as to their course of conduct towards the section men working on the track?

A. That would be impossible. The officers do not konw just where they are and what they are doing.

Q. The principal dependence that the section men or any of the maintenance of way men, doing work on the track, for his own safety, is in himself?

A. Entirely so.

Q. Unless they are notified to the contrary by the men working on the track, what rights have the operating crews to assume to be a state of facts in respect to the track? Have they the right, unless they receive notice to the contrary, to assume that the track is safe?

A. Unless they have some notice that the tracks are obstructed or that it is necessary to slow up for any cause, it is necessary for them to have instructions that would have to be communicated by the section foreman to the Chief Train Dispatcher who issues such instructions.

Q. Please explain to the jury what use is made of the torpedoes in giving signals?

A. A torpedo is a precautionary signal placed on the rail, the explosion of which is noted and their attention is called that there is [fol. 218] a danger signal to be used, which is a red flag. A torpedo is the first signal and the red flag is the second signal.

Q. Are torpedoes used for that purpose in the day time as well as in the night time?

A. Yes, sir.

Q. And on straight tracks as well as curved tracks?

A. Yes, sir, at any point.

Q. The work of these maintenance of way men and section men on the track has to be done continually with reference to the operation of trains over the track?

A. Yes, sir.

Q. What are the special duties of a section foreman?

A. The special duty of a section forman is to properly maintain his track in a safe condition, material for which is furnished by me or by the Supervisor of tracks, that material has to be used in an economical manner and the work has to be properly and safely done.

Q. He has the care then of the track in his section, and he has also the care of the material supplied for the purpose of keeping the track in repair?

A. Yes, sir.

Q. And is responsible for the proper custody and disposition of such material.

A. Yes, sir.

Q. You don't know anything about the accident to Mr. Nixon, do you?

A. No, sir.

Q. When a train is coming along and the men are operating with a hand car or velocipede on the track what is the duty of the section men in regard to removing the hand car or velocipede out of the way?

A. It is their duty to look in either direction expecting a train at any minute, and approaching a bluff or a point at which the train

could not be seen a sufficient distance, to stop and a flag could be run around to properly protect them.

Q. And if a train is coming what do they do with the car or velocipede?

A. That is removed immediately, of course, and if it is necessary to stop the train, why the train is stopped.

Q. If the car should be struck by a train and broken up who is responsible for it?

A. The section foreman or the man in charge of the car, which is the section foreman.

Q. What was the extent of the privilege given to Mr. Nixon in regard to the use by him of the velocipede?

A. Yes, sir.

[fol. 219] A. The only use or only permission given him is on the company's business.

Q. In going from his home?

A. In going over his track for inspection or for anything that may be the company's business.

Q. If it was necessary for him to inspect the track he could use it in going over the track?

A. Yes, sir.

Q. And he had the right to use it in going from his work to his home?

A. He had no right without permission.

Q. Did he have permission?

A. He had permission from me.

Q. To use it in going from his home to his place of work?

A. From the tool house to his home.

Cross-examination.

By Mr. Drysdale:

Q. Mr. Douglas, I think you told us at the last trial you had been with the company for 41 years?

A. Yes, sir.

Q. During that time had you not actual practical experience yourself as a track foreman or section foreman?

A. I was five and a half years a section foreman.

Q. In other words, you occupied the same position Mr. Nixon was occupying at the time of his death?

A. Yes, sir.

Q. So you are in a position to speak with a good deal of authority as to the duties, etc., of a section foreman?

A. Yes, sir.

Q. You say that the hand car or tricycle when approaching a curve, where a train could not be seen for some distance ahead, that it is the duty of the men in charge of the car to send out a flag?

A. Yes, sir.

Q. That presupposes, doesn't it, should there be a train crew approaching, that they are keeping a lookout and it is put out for the purpose of warning the approaching train, isn't it?

A. Yes, sir.

Q. And that presupposes that the train crew are keeping a lookout—there is no torpedo mentioned there.

[fol. 220] A. Not a lookout for the section men especially because they have no way of knowing where the section men may be.

Q. I understand that, but when you put out a flag you presuppose that somebody is going to see it?

A. Sure.

Q. And if they are not keeping a lookout they couldn't see it?

A. Of course, if you don't look you couldn't see. If you shut your eyes you can't see.

Q. Of course not, but isn't it a fact that the rules of the company require that an engineer shall keep a constant lookout ahead except as he is prevented by other imperative duties?

A. I think that is the rule about.

Q. And isn't it a further rule that it is the imperative duty of the fireman to keep a lookout when he is not otherwise engaged.

A. I think so, when not otherwise engaged.

Q. Now there is, as I understand you, no special duty on the part of the train crews to keep a lookout for the track men, but it is their duty to keep a general lookout for obstructions of any kind that might be ahead of them all the time.

A. It is their duty to be looking out at all times when not otherwise engaged.

Q. Do you think it is permissible by the rules of the company for a train to run for any considerable distance blind and no one keeping a lookout?

A. You say is it possible?

Q. Is it allowable under the rules of the company for a train to run blind for a quarter of a mile or a half mile or a mile?

A. It is allowable?

Q. Yes, sir.

A. That is putting it another way. The rules require them to look out when not otherwise engaged.

Q. Suppose it became imperative for the engineer to look after some part of his machinery and at the same time it became imperative for the fireman to look after another part of the machinery, would it be allowable for that train to keep on running indefinitely, or should they stop?

A. That depends, I don't know about what might be the condition inside the engine, I cannot tell. There is no way for you to know what the engineer is doing. He knows his duty and I do not, and it is not for me to know what is going on in the cab, I am not a locomotive engineer or fireman.

[fol. 221] Q. As a railroad man of 41 years' experience, wouldn't you say under these circumstances it was the imperative duty on the part of the engineer to stop his train?

A. I don't know, it depends upon circumstances and what the engineer has to do.

Q. Now the section of track over which Mr. Nixon had control,

under you, was used in interstate traffic, wasn't it. In other words, trains ran over there that went into Clifton Forge and right on into West Virginia?

A. I suppose, but not all trains.

Q. I didn't say all trains, but some trains do.

A. I think they do.

Q. There is no doubt that traffic is carried from Virginia to West Vigrinia over that same track, is there?

A. That is a fact.

Q. You have said Mr. Nixon had a right to use his tricycle on the company's business, and express permission. He would have general permission to do that whether he had special permission to do that or not, to use it on Company's business?

A. Yes, sir.

Q. And he had express premission to use it going to and coming from his own work?

A. Yes, sir.

Q. Now it was Mr. Nixon's duty under the rules of the company to pass over the track as often as practicable, wasn't it?

A. For an inspection?

Q. If Mr. Nixon had discovered an obstruction or defect of some kind on the track on that particular morning when he was killed it would have been his duty to have stopped and attended to it immediately, wouldn't it?

A. As an employee, of course he would.

Q. So that he really was in the employ of the company at that time.

A. He wasn't on duty.

Q. But he was passing over the company's premises by express permission, and you as his superior say if he had found any defects it would have been his duty to have stopped right there and done what he could to remedy it, and stop any train that was coming?

A. Any employee would do that of course, whether on duty, or not.

Q. I am not interested in any employee, I am interested in Sam [fol. 222] Joe Nixon. It would have been his duty to stop right there and remedy the defects or to warn trains that might have been hurt by the defects?

A. Certainly it was.

Q. It is in evidence here by Mr. West, I think, the night operator at Warminster, that this particular train, 1008 that killed Mr. Nixon left Warminster I think at 6:30 and that he was informed there would be a clear track for a number of miles, there was a difference about it, but we will call it approximately for fifteen miles. That only meant that there were no trains in that fifteen miles, didn't it?

A. How did you say that?

Q. Mr. West, the night operator testified that train 1008 that left Warminster at 6:30 that morning and killed Mr. Nixon apparently five minutes later had a clear track for fifteen miles. That

only meant that there was no other train or engine or car in that fifteen miles?

A. That is what it means.

Q. Does it come within your knowledge whether the operator knew or the engineer knew that Mr. Nixon was in the habit of going to his work about 6:30 o'clock in the morning and using that tricycle?

A. I don't know.

Q. Anyway, notification that the track was clear had no reference whatever to Mr. Nixon and his tricycle?

A. I should not think so.

By Mr. Long:

Q. Did Mr. Nixon, or any other employee owe the company any contractual duty when he was not on duty?

A. No, sir.

Q. Any duty that he owed was a mere moral obligation to look after the interests of the company, was it?

A. Certainly, that is all.

By Mr. Drysdale:

Q. What do you mean by contract duty? There may be an expressed contract or there may be an implied contract. Wasn't there an implied contract between Mr. Nixon and the company that if he discovered a defect on the track at any time that he would remedy it?

A. Yes, sir.

Q. That was part of his duty, you just said?

[fol. 223] A. If he saw anything that would cause any trouble that was part of his duty, certainly.

Q. So there was an implied contract, if not an expressed one. That will do, thank you, you can stand aside.

Witness stands aside.

F. W. Droste recalled.

By Mr. Long:

Q. You have already testified about a test made to determine the visibility of the scene of the accident from the porch of the Nixon house?

A. Yes, sir.

Q. And you have testified, as I recall, that an object would have to be thrown out eighteen feet from the track before it could be visible from the porch of the house, with a train standing or intervening between the house and the point of the accident. That was your testimony was it?

A. Yes, sir.

Q. And that was the result of a test which you made and which you spoke of?

A. Yes, sir.

Q. In what direction was the train moving when that test was made?

A. The train was coming from the east and going west.

Q. It was a train moving in the same direction as the train that killed Mr. Nixon?

A. Yes, sir.

Q. Now in the course of that test was any effort made to determine whether a man riding on a velocipede in front of a train would be visible?

A. There was.

Q. How was that done?

A. There was a freight train coming along and ten cars on it, and engine and caboose and the train was flagged in front of Mr. Nixon's house and one of the colored men was put on the three-wheel velocipede and started up the track at an ordinary rate of speed as they travel from day to day inspecting the track, with this engine following behind. An observation was made by several members, some standing on the porch and one or two standing back in the yard and [fol. 224] at different points along this line of vision, and these lines of vision were taken from observations where each individual had observed these particular points and the car was removed right at the place of the accident and the train was stopped some forty feet this side to give the man ample time to get off the track.

Q. Could he be seen?

A. No, sir, he could not. The closet place that he could have been seen from the porch is eighteen feet when the train was standing forty feet from the object. Had the train advanced to the place of accident the line of vision would have been further out than eighteen feet.

Q. Now it was stated in the testimony of another witness that in connection with the test made with an east-bound train Mr. Dunn, I believe it was Mr. Dunn, took his station at the scene of the accident and had to move out thirty-five feet before he was visible?

A. The map clearly shows that, forty feet from the center of the track.

Q. Why the difference between forty and eighteen?

A. There were two trains, one approaching from the east and the other approaching from the west, two different lines of obstruction. The train approaching from the east going west obstructs the view from the fact the caboose obstructed your view. On a train going east the engine would be in front making a difference.

Q. Was there a difference in the height of the caboose and engine?

A. Yes, sir, the engine is much larger than the caboose, and another thing, the engine would be at the place of the accident along a clear vision of the track within forty feet, or the length of the engine, of the accident, whereas a train approaching from the east going west the line of cars would be something like 600 feet back

on the track before a man would be hid, in other words, there would be an obstruction of the track for over 600 feet due to the engine, cars, and caboose.

Cross-examination.

By Mr. Drysdale:

Q. The train that struck Mr. Nixon was going west?

A. I understand it was.

Q. That is the only one we are interested in. Now you say a train going west, a man would have to be thrown eighteen feet to the north before he could be seen from the porch?

A. Yes, sir.

[fol. 225]. Q. That would depend a good deal on what part of the porch the observer was stationed, wouldn't it?

A. Yes, sir. This observation was taken from the northwest corner of the porch as close as you could get, at the head of the steps and not be off the porch.

Q. And that presupposes that the man was thrown immediately to the right. Suppose he was thrown up in the air?

A. I couldn't say where he would go up in the air. I didn't see the man hit, but a man would have to be out eighteen feet from the center of the track in order to be seen with a train of cars, engine, and caboose, forty feet from the place of the accident.

Q. It is in evidence, or will be when the engineer goes on the stand, that the train struck Mr. Dixon was going 38 miles an hour; that the engine drawing that train was I think, a Mikado engine, next to the largest engine used on your tracks or any other tracks, as I understood. Now the pilot, and I call it a cow-catcher, that is a "V"-shape, isn't it?

A. Yes, sir.

Q. The tricycle or velocipede has two wheels on the righthand side looking forward as a man is driving, and one on the left?

A. Yes, sir.

Q. The man sits over the two wheels, or immediately over the right rail, and with that cow-catcher hitting that man in that position and the train going 35 miles an hour, would that man go in the air or immediately to the right?

A. I have seen cows hit and they go to the side, and I have seen sheep hit and they would go under the engine.

Q. I was going to bring to your observation a case where a man was hit and went up higher than the engine, and then fell to the right, as Mr. Nixon did. Would you say that was impossible in his case?

A. That all depends on conditions. The cow-catcher would be in the center of the track, and would life a body and throw it if it was in the center of the track, but if a man was on the rail, the chances are he would not go up in the air, but it would just give him a side-swipe and knock him off the track and not in the air.

Q. But it is quite possible that might have happened, that it hit him and threw him in the air?

A. No, sir, it is not probable, because he was over the rail and the object being hit and the cow-catcher being "V"-shaped, the object would hit the cow-catcher at such an angle it would throw a man on the side of the track instead of going in the air. Had the man been in the center of the track the chances are he would have fol-
[fol. 226] lowed the line of least resistance and have been thrown in the air.

Q. Now when he was hit—there is the slope (indicating) and here is the rail (indicating), wasn't he hit by the slope, like this (indicating)?

A. No, sir.

Q. What part of the tricycle would be hit?

A. The rear end of the tricycle would be hit first.

Q. Of course that opinion of yours or estimate of yours is based on scientific principles and not from actual observation?

A. From actual observation in that particular case.

Q. Did you ever see a man hit in that way?

A. I have, in other cases.

Q. You have seen a man hit on a tricycle?

A. Yes, sir.

Q. How many have you seen hit on tricycles?

A. I saw one at Meadow Creek less than two weeks ago.

Q. You had not made this estimate then, had you?

A. Yes, sir.

Q. I thought you told us a little while ago, though I may be mistaken, but my recollection is that you told us you had seen cows hit and sheep hit, but not men?

A. Yes, I have seen cows and sheep hit.

Q. You didn't tell us you had seen a man hit?

A. No, sir, I didn't see that man.

Q. And you didn't say you had seen any man hit?

A. I said I did not see Mr. Nixon hit.

Witness stands aside.

J. F. Reardon sworn for defendant.

Direct examination.

By Mr. Long:

Q. Mr. Reardon, what is your occupation?

A. Locomotive Engineer for the Chesapeake & Ohio Railway Company.

Q. How long have you been in the employment of the Chesapeake & Ohio Railway Company?

A. Thirty-two years.

[fol. 227] Q. How long have you been employed in the capacity of locomotive engineer?

A. Twenty-three years.

Q. What division have you been operating on?

A. The Richmond Division, James River we call it, the same division all the time.

Q. And you have always, since you have been running an engine, operated on the James River Division?

A. Yes, sir.

Q. Between what points?

A. Between Richmond and Gladstone.

Q. You then had been operating for twenty-three years?

A. Twenty-three years altogether.

Q. I mean as an engineer?

A. Twenty-three years, yes, sir.

Q. On the James River Division between Richmond and Gladstone?

A. Yes, sir.

Q. Prior to that time in what capacity were you working for the railroad?

A. I was working as a fireman.

Q. Were you working on the same division?

A. Yes, sir.

Q. And over the same part of the division?

A. Yes, sir.

Q. So you have been operating then for thirty-two years between Gladstone and Richmond?

A. Yes, sir.

Q. Either as a fireman or an engineer?

A. Yes, sir.

Q. Were you in charge of the engine by which Mr. Nixon was killed?

A. Yes, sir.

Q. Had you ever had a fatal accident before that time?

A. No, sir.

Q. Had your engine ever before that, in the twenty-three years you have been operating it, struck anybody?

A. No, sir, I never had a serious accident or hit anyone in my life. I regret very much to say it occurred this time.

Q. Do you recall about what time you started from Warminster that morning?

A. I don't know exactly, the block book shows 6:30. I never paid [fol. 228] particular attention to the time because I had orders that would carry me clean to Gladstone and I had a white board leaving Warminster, which gave me a clear track from there to Gladstone and no other telegraph office between Warminster and Greenway.

Q. When had you left Richmond?

A. Some time the night previous to that, but I disremember the exact hour.

Q. When you arrived at Warminster you were given a clear block up to Greenway?

A. Yes, sir.

Q. Were there any other telegraph offices open at that time?

A. Not between Warminster and Greenway.

Q. What is the significance of having a clear block?

A. It signifies that there is no other train in between that space of track or in that track between those two offices.

Q. And this train would have the right of way, the exclusive right of way?

A. Yes, sir, and no train either going west or none coming east. If there had been an eastbound train there I would have got a red block and caution card notifying me of the number of the train that was in that block.

Q. After you left Warminster, it has already been testified in the case that you approached the house that had been occupied by the section foreman, Mr. Nixon?

A. Yes, sir.

Q. A distance of about two miles from Warminster?

A. Yes, sir.

Q. As you approached that house, please explain to the jury what you were doing in the engine?

A. A short distance, judging I would say probably a fourth or fifth or sixth of a mile or something like that before I got to the Nixon house I got up and looked at my lubricator and in looking at my lubricator it necessitates my getting up on my seat box, as the lubricator is attached to a bracket that is fastened to the boiler-head, what we call the boiler-head is the back end of the boiler, where all of our steam g*ua*ges and throttle valves and all like that is. There is a bracket bolted on to this boiler-head which holds this lubricator. I suppose you gentlemen know what a lubricator is. It is the receptical for holding the oil, which oil is used in your cylinders and valves, and I took the electric bulb and braced myself with one hand on the throttle guide and took this electric bulb and held it behind what we call the sight feed glass, a glass about two inches in diameter, [fol. 229] and when the oil shows up as getting low you can see the light through this glass, and if there is plenty of oil in there it shows dark. You can just see the oil and that is all, and that notifies you how low your oil is getting in this lubricator, and if it had been giving this engine a certain amount of oil all night, enough to take care of the valves for the time being, when we arrive at a terminal we shut all the steam off this lubricator and the hostler takes the engine in charge and he carries it from the train to the ash pit and from here to the coal bin and lots of times they have got a car to place and then he takes this engine to place that car, or if he has got an engine blocked up he can take this engine and move that and that would necessitate getting your valves and cylinders dry, so I found out I had more than sufficient oil to carry me to Gladstone, and to make my engine a little slick, as we say, on the return trip I increased the speed of the oil. I judge this took me from about two or three minutes to do that, and when I finished doing this part of my duty I got down on the seat box and looked out of the window, and I was in sight of Midway Mills. I make this a practice, a common practice, at each end of the road in between runs, I notice my lubricators to see if they are feeding properly and to see if a sufficient or proper amount of oil is going through my valves, but before I get to the end of my terminal or run I always find out as near

as possible how much oil I have in the lubricator, and if I have an excess I always increase the speed for the same purpose I told you gentlemen a little while ago.

Q. Did you do that on every run?

A. Yes, sir.

Q. And it takes about two or three minutse to do it?

A. Yes, sir.

Q. And besides this process that you go through with, just before reaching a terminal in order that your machinery may be in good condition you look at the lubricator from time to time during the course of your journey?

A. Yes, sir, certainly.

Q. Is a proper and efficient operation of the lubricator an important thing?

A. It is one of the important things in the smooth working of your engine, is the proper appliance of oiling through this lubricator through your cylinders, because if you are not getting the proper amount of oil from your lubricator to your cylinders you get dry valves and your engine will not do the work properly, she will cut [fol. 230] the packing rings and then we also have another set of packing rings that is on your follow head or the bell ring, as we call it. It is a big ring in there that holds the packing and that keeps the engine from blowing. I expect you gentlemen, or most of you, have heard the engine-sometimes on a strain blow through the stack as if the fireman had the blower on. That is a defect in the engine, the packing rings are bad or the cylinder packing is bad, or the cylinder is cut or something of the kind and that comes from the improper lubrication of the engine.

Q. You say you began your examination of the lubricator about a point where the Nixon house became visible to you?

A. Yes, sir.

Q. Knowing that your attention would be diverted for a minute or two, what did you do by way of a precaution?

A. At this point of the track, we are supposed—when we go to railroading to make trips over the road we are supposed to learn the road and the location of the road, where the switches and stations and such things as those are and I knowing full well this location, there is not even a public road crossing there and I don't think I would exaggerate when I say I never seen as many as half a dozen pedestrians altogether travelling on this piece of track, outside of the workmen, I have seen them working on the track, and I had nothing to remember on my mind that I had anything in particular to look out for, because I had a white board leaving Warminster, which notified me that I was not following any train and there was not any public road crossing there and my engine called for my attention for the purpose as I have stated previously, and I gave her that attention at the time being.

Q. Before beginning this examination did you do anything, or make any signal of any sort?

A. Yes, sir, I blowed the road crossing, as I got on the box, as an extra precaution.

Q. This examination occupied you while the train was proceeding from somewhere a little east of the Nixon house until you got about to Midway, or about two miles, or how far did you go on the track while you were making this examination?

A. As I said a while previous to this that I began to adjust the lubricator or that I mounted the seat box to adjust the lubricator, and when I did that I was in sight of Mr. Nixon's house, and when I finished doing this I got back on my seat box and sat down and looked out of the window and I was in sight of Midway Mills. I judge from the speed I was making and the amount of track that I had travelled [fol. 231] it would take me about two and a half or three minutes, as I had gone at least a mile or over and I was making a speed on an average of about twenty-five miles an hour.

Q. How long a train were you pulling?

A. About ten cars.

Q. Consisting of what kind of cars?

A. I really don't know whether they were fifty or seventy-ten now, I never paid any particular attention to that.

Q. Were they box cars or what?

A. They were coal cars.

Q. And a caboose?

A. Yes, sir.

Q. Did you know where Mr. Nixon lived?

A. Yes, sir.

Q. Did you know anything about his personal habits or about going to his place of work on a velocipede?

A. Not in the least. I never saw Mr. Nixon on a velocipede in my life. I have seen him on the lever car.

Q. You did not know then that he used the velocipede?

A. No, sir, I had no knowledge of it in any way, shape, or form.

Q. Was this examination which you made of your lubricator, before working hours began?

A. I didn't know whether he went to work at seven or seven-thirty at the last trial, but I know accurately now, that he goes to work at seven o'clock, so from the time he watch stopped and from the time showing when I left Warminster undoubtedly it happened at twenty-five minutes to seven or twenty-five minutes before he was supposed to go to work.

Q. It was before the section men were on duty on that section?

A. Yes, sir.

Q. What kind of an engine were you using?

A. I was using a type engine called Mikado.

Q. A large engine?

A. It is next to the largest engine we have in service.

Q. When you are looking out, looking ahead for obstructions on the track or to see whether the track was clear, what is your position in the cab?

A. Unless I am looking for some particular obstruction I sit like

this is the arm-rest (indicating) I would sit like this (indicating).

Q. You have a seat to sit on?

A. Yes, sir.

[fol. 232] Q. And you sit on the seat on which side of the engine?

A. The right-hand side.

Q. And your outlook is through a window in front of you?

A. Either that way or I can look out of the side window. I have two ways to look out. I have a little, about twelve by fourteen window up in front of me, called the storm window, in case it is raining or snowing and beating in our face, that obscures our vision in looking from the side of the cab, and we adjust this window so that it is straight open, this little window, and we look direct through that.

Q. How far in front of your cab window does the engine body or boiler extend?

A. You mean the boiler-head?

Q. How far in front of you, beyond your cab window, does the front, towards the smoke stack, extend?

A. I don't know, exactly, I never made any accurate measurements, but it is a good distance. I suppose from the running-board out to the smoke-stack is at least eleven feet. The whole length of the boiler I should say would be thirty-five or forty feet.

Q. When you are rounding a curve turning to your left can you see the track?

A. Very little of it. I am on what you call the outside of the curve then and very little of it I can see. I can see better on the inside of the curve because I can look ahead of the smoke-box and I can see a space I judge 250 feet.

Q. If you should happen to be on a curve towards the left?

A. I couldn't see practically none of the track at all.

Q. You would be thrown clear of the track altogether?

A. Yes, sir, it would destroy my vision of the track entirely. The only way I could see any of it at all would be to get up and poke part of my body out of the window, and that is not good judgment, because you might hit a mail crane or switch stand or something of the kind. We never lean out of the window to any extent like that unless we fully satisfy ourselves at what point we are on of the road.

Q. What is the requirements with respect to your keeping a lookout ahead of the engine?

A. To give the utmost care and attention, as far as conservative we can do.

Q. Have you got anything else to do besides looking out?

A. I have got my steam *guage* to watch, my air *guage* to watch, [fol. 233] my inspirator to operate. I have got to watch the fireman and work in union with him, so as to keep a uniform rate of speed, and when he goes to work to slash his fire I shut my water off and give him an opportunity to do his work. I have my orders to read from time to time. We get as many as ten or twelve orders and sometimes there is only one order in that bunch that is any account, because the others are superseded or annulled and it only makes one order in the bunch any good, and I generally make it a rule to re-

hearse these orders, take them out and read them, and sometimes they take the right of way of a man who has got, by the time table to hold the main line, and they will take that right of way from him, by a train order and make him go in the side track, so we have to give extra precaution to things of that kind to show that we have a right to hold the main line.

Q. And in addition to looking out you have these other duties to attend to?

A. Yes, sir.

Q. Are they essential duties?

A. I just mentioned them to you.

Q. Are they essential, are you obliged to attend to them, are they imperative?

A. Certainly, I am bound to operate the engine and look after them.

Q. Did you mention your water *gu*age?

A. I have my water to look after. We have a water glass there, but we don't depend on that altogether, we have *gu*age cocks and we try them from time to time, to get the location of the water in the boiler.

Q. Are there duties also that require the constant attention of the fireman that is associated with you?

A. I should watch and work in conjunction with him so I can keep a uniform speed.

Q. Has he important duties also inside the cab, that is what I asked you?

A. Yes, sir. In the class of engines that I was using we haven't any means of firing by hand, they are fired by a mechanical device called a stoker, and this stoker has to be operated by steam. He operates this from sitting on his seat box by means of a valve. He has got to watch out that this stoker is not working too fast or too slow and he has to see that his coal is down far enough over his screen, they have a screen that shifts back and forth in the tank and that keeps the large lumps, going down, and he has to watch that and sometimes, something will get in there that he has to get out. [fol. 234] Sometimes an extraordinari-y large lump of coal will work down through that by some means and it will block his convey pipe. This stoker works from the tank up under the running-board of the engine or foot-board as we call it, and this machinery revolves and takes the coal and takes it to the elevator pipe and dumps it in there and these buckets are operated by a chain, these buckets are carried up through this elevator pipe which has a trip at the top which trips these buckets, and then you have a divider, and if one side is getting too much coal you can move it and give the other side more. Of course you have to watch your fire from time to time to see that you are getting a uniform amount of coal on each side. Then it goes down through the conveyor pipe, two pipes, I suppose four and a half or five inches in diameter, and then it sprouts into the fire-box and then he has got valves which he has got to properly adjust and he has to see that they give a certain amount of steam and not blow too hard and to be sure to blow hard enough, because if

it blows too hard he will stop his water off and will not get a uniform amount of steam.

Q. Who was the fireman with you?

A. Mr. Hollis.

Q. How long had he been working with you?

A. About six months, as well as I can remember on this occasion, but he has fired for me from time to time previous to that.

Q. You had frequently worked together?

A. Yes, sir, we had. When you have a regular engine you have the same fireman all the time unless he wants to lay off a trip, and then if he lays off a trip one of the emergency men fills his place.

Q. When you got up to examine the lubricator could Mr. Hollis see what you were doing?

A. Yes, sir.

Q. What position was he then occupying, as nearly as you can recall?

A. He was sitting on his seat box as near as I can recall, but to save my life, I couldn't tell you what he was doing, because I paid no particular attention to him. He was a man of thirteen years' experience and he had been promoted himself and he was as much of an engineer as I was, only he was set back to firing on account of slack work. When the works falls off they let you do your job as fireman instead of laying you off altogether, and this man had been promoted and been running an engine, I don't know how long, but several years.

Q. Was there anything in the situation there, the locality or any circumstance known to you why you should have called on him at that particular time to get up and make a special lookout?

[fol. 235] A. No, sir. I had to give the engine attention right then and I have to do so and so right now, but I knew I wasn't approaching any public road crossing and I was not approaching any congested city, in fact, there is only one or two little farm crossings there, and it is not a place that is frequented or travelled by the general public, and as I stated previous to this, I had a white board which eased my mind in that line that there wasn't any train ahead of me or I wasn't approaching any train, and it was twenty-five minutes before the workmen should be at work and I didn't see any reason why anything particular should have been impressed on my mind at that time that I should look out for any obstruction.

Q. And you knew, didn't you that what you were doing would only take a minute or two?

A. Yes, sir.

Q. And you would soon be back in position?

A. Yes, sir.

Q. And during that interval you saw no reason why Mr. Hollis should be called upon to make a special lookout?

A. No, sir.

Q. Did it occur to you that he should be called?

A. He seen what I was doing, and he knew what I was going to do, and his business and time in the service of the company had taught him his business and I don't doubt in the least but what

he was attending to something very important if he wasn't looking out, but I couldn't say to save my life whether he was looking out or what he was doing.

Q. The plaintiff in this case, Mrs. Nixon, has testified that when your engine passed her house she had a momentary glance or vision of you and the fireman and that you were down on what she calls the deck, between the engine and the tender, and you were engaged in a conversation with one another and laughing and talking. Is that true?

A. No, sir, that is not true. When I passed Mrs. Nixon's house I was standing on the seat box. If I had been standing on the deck, as you state, she could not have seen anything but my shoulders, as my head would have been that much (indicating) about my cab window. When I sit down on the seat box the top of the cab window strikes me about there (indicating) and I have to duck my head a little bit to look out.

Q. About how much space is there between the engine and tender?

A. About the width of me.

[fol. 236] Q. About the width of you?

A. Yes, sir, I can stand up in there and the tender will touch me and the cab will touch me. That is saying a whole lot, because I am a right good-sized man, and it kinda squeezes me in there, it don't squeeze me either, but it touches me.

Q. As your engine passed on did you know you had struck anybody?

A. No, sir, I had no knowledge of it, no idea of it until I got to Gladstone and was in the bunk-house.

Q. How did the information come to you then?

A. We have a phone in that bunk-house for the use from the main office when calling crews, so the operator he came to the phone and rang up there, and asked if I was in the bunk-house, and they told him yes, and they asked me to come to the phone and I did, and he said, "do you remember seeing a man on a velocipede down about 101 mile-post," and I said, "no," and he said "there has been a section foreman killed down there and they say your engine done it," and I said, "no, I am sorry to hear that, but I don't know anything in the world about it." I said, "I hope it is not true, that is all," and then I said, "I hope he is not dead," and he said, "well that is what they say," and then I went out and made an inspection of the engine and I found a biscuit or two on the front of the engine and a porcelain top. I knew Mr. Nixon very well in person, and he was a man I thought a lot of, and I regret very much the circumstances, but of course it would happen to any man attending to his duties, as well as it would to me.

Q. When you did that did you think over the circumstances to see what you had done?

A. Right at the time being, I didn't know what I was doing, but I rehearsed my memory and it came to me as plain as day what I was doing.

Q. Did it occur to you that there was anything you had done with

the light you then had, that you could regard as negligence or carelessness?

A. No, sir. I was attending to my business, Mr. Long, something that occurs in my daily occupation, I was attending to them.

Q. And something that occurs and necessary to be done in every run you make?

A. Yes, sir, something I do approaching each terminal.

Q. Your attention to that lubricator wasn't for the purpose of saving a little oil, was it?

[fol. 237] A. No, sir, my idea in looking in that lubricator was to see how much oil and how fast it was feeding. From my experience I could tell how fast it was feeding, and how much oil showed in this glass and how far it would run me, so I increased it enough to make it feed out entirely so that when I got to the end of my run my engine would have the benefit of the oil.

Q. You did it in order to affect——

A. The working of my engine on the return trip.

Q. So that the engine would not suffer while it was being used at Gladstone by the hostler there?

A. Yes, sir.

Q. If you had any idea Mr. Nixon was on that track, Mr. Reardon, ahead of you, would you have taken that time to look at the lubricator?

A. No, sir, I would have torn these cylinders off if such a thing was necessary rather than have an occurrence of that kind happen. That is the first accident I have had since I have been running an engine, or since I have been in the employ of the company, and of course it was a very serious one, but there cannot none of us undo it, I wish to God we could.

Cross-examination.

By Mr. Drysdale:

Q. Mr. Reardon, I have taken down what I took to be your exact words, in answer to a question by Mr. Long, "I did it so my engine would have the benefit of the oil." That is correct?

A. Yes, sir.

Q. I want you to understand that nothing I should say, or rather I do not wish to charge you with any crime or anything of that kind.

A. I said that was the main and particular reason that I gave that oil. Mr. Long asked me was it to keep from wasting it and I said that was not the particular reason, although if I had not done it it would have been wasted.

Q. You testified, I think, at the last trial, that the engine you were in charge of was in first class condition?

A. Yes, sir.

Q. It was one of the best engines, I suppose, on the road, and you had began that journey at Richmond?

A. Yes, sir.

Q. And had no trouble with the lubrication up to that point?

[fol. 238] A. No, sir.

Q. And you had no trouble with the lubrication up to that point, and the engine was still getting enough oil to keep it going, wasn't it?

A. It was.

Q. If you had had to go to a point beyond Gladstone you would not have increased the flow of the oil, but you would let it work like it had been working from Richmond to that point?

A. No, sir, in approaching Gladstone I shut the steam and water off and all the time the hostler is handling these engines, it don't make any difference how much work he is doing, he is not giving this engine any oil, and if I had to go further than Gladstone, I would have had to refill the lubricator, which we do have to do lots of times on the road. We have no means of finding out at the start the necessary amount of oil in the lubricator when they first fill it because you turn the steam and water on and as I said we have no means of knowing how much oil there is until our oil moves enough so that you can see through this sight feed glass and then from experience and knowing what the lubricator holds and how fast you are feeding it and taking those facts into consideration we know how long the amount of oil then will about run you, or how many miles it will about run you.

Q. When you start out on a journey, I understand you make it a point to have a reserve supply of oil, if possible?

A. Yes, sir, I do. I never leave a terminal without I have got an extra supply of oil.

Q. I think you said that before you got up on your seat box to examine the lubricator you blew for a crossing, which crossing was that?

A. I didn't say I blowed for a crossing, I said I blowed as an extra precaution.

Q. Where was your engine at the time you blew?

A. It was around the bluff you all showed me on the map on the previous occasion, and the point I pointed *ota* and to be accurate with you you said it was about 780 feet.

Q. How far were you from the Nixon dwelling when you blew the whistle?

A. Just before I mounted the seat box.

Q. A train going at twenty-five miles an hour would do a mile in two and a half minutes, wouldn't it?

A. About two minutes and twenty seconds, or something like that. [fol. 239] Q. Then if the job was going to take you two or three minutes your engine would run a mile or a mile and a half while you were so occupied and while you could not keep a lookout, in other words, while you were doing that unless the fireman was keeping a lookout the engine was running blind, wasn't it?

A. Unless the fireman was keeping a lookout, yes, and that is a daily occurrence.

Q. Between the fireman and the engineer, which is the superior?

A. The engineer.

Q. The fireman is under his orders?

A. Yes, sir.

Q. When you started to mount your seat box to attend to the

lubricator, or examine it, did you ask Mr. Hollis, the fireman, to look out?

A. No, sir.

Q. Wouldn't that ordinarily have been a wise precaution?

A. In approaching a city or anything like that, if it was a piece of work that necessitated my attention right at that time being, or a public road crossing, or he had not been an experienced man and had known what I was doing himself then I do not doubt in the least but what I would have said to him, "Charlie, Frank, or John, I am going to do so and so, look out."

Q. You knew, Mr. Reardon, you were approaching a curve where your view was obstructed?

A. I had every reason to believe though that there was no obstruction there because there was not even a public road.

Q. After you got around that curve you would have a straight view for a mile or a mile and a quarter, wouldn't you?

A. Something like that.

Q. Wouldn't it have been a wise precaution to have waited until you got around the curve and then have examined the lubricator?

A. If this thing had happened around in the other curve or around the other bluff wouldn't you have said or done the same thing?

Q. Pardon me, what I would have done is not pertinent in this case, but the inquiry is what you would have done?

A. I picked out as safe a place as I thought I could possibly do it and I wanted to and I do give my engine that special attention on every trip. Now I had every reason to believe that the track was clear for me, as I have stated, and I had not seen pedestrians frequent this place, there wasn't any public road crossing there, and I had been [fol. 240] notified that I was not following any train, and why should I wait until I round the curve at a particular point like that, any more so than I would at the time being, when I could do the work in about two and a half minutes?

Q. You could do the work in about two and a half minutes if you had waited another minute or so—now would that have made the slightest difference to the engine?

A. If I had done it I would have been on the straight line, no doubt about that.

Q. Please answer my question. If you had waited for another minute or a minute and a half to have made that examination of the lubricator would it have made the slightest difference to the engine?

A. None in the least.

Q. So that that was not an imperative duty at that time.

A. It was a duty that I was supposed to do and this is one of the safest points on the road that I could pick out to do it and I should consider it under those circumstances an imperative duty.

Q. Mr. Reardon, do you consider that having chosen a time when you were on a curve to do that was safer than if you had done it on a straight track where you could see a mile ahead, and which you were just approaching?

A. Safer?

Q. Yes.

A. I had no reason to believe, Mr. Drysdale, that it was not safe where I did it, even if I was on a curve.

Q. As a man of, I think, thirty-two years' experience, you had been going up and down that track from Richmond to Gladstone as an engineer and fireman, for thirty-two years?

A. Yes, sir.

Q. You knew practically every foot of that track?

A. I did.

Q. And you have known it for years?

A. I had.

Q. And you knew Mr. Nixon had lived in that house for a year or more at that time, didn't you?

A. I didn't know exactly. I knew he lived there, anyway.

Q. Didn't you know that it was the almost universal practice for a track foreman who lived on the track to use these tricycles going to and from their work?

A. No, sir, I wouldn't judge that he would get up in the middle of the track, I had no knowledge of him using the velocipede and I [fol. 241] never saw him on one in my life, and there was a walk-way on the side and also a walk-way up on the other side of the canal

Q. Isn't it the universal practice for a section foreman, who lives on or near the track, to use that track, *going* to and from their work?

A. I don't know.

Q. Anyway you knew the hour of these men going to work was seven o'clock?

A. Yes, sir.

Q. And you knew at this time it was twenty-five minutes to seven?

A. Yes, sir.

Q. If Mr. Nixon had been walking to his work it would have taken pretty well twenty minutes or so to walk it, wouldn't it?

A. I should not think so.

Q. It was about a mile and a quarter away?

A. Yes, sir.

Q. Four miles an hour is pretty good walking.

A. You said twenty or thirty minutes. I do not think it would take him more than ten or fifteen minutes at the least, to go to the tool house.

Q. You think he could walk a mile and a quarter in ten or fifteen minutes?

A. I couldn't do it, but Mr. Nixon was a man of slender build and he could out-do me in walking.

Q. As a matter of fact, you never considered Mr. Nixon; it never entered your mind at that time that he would be on the track?

A. No, sir, I never had Mr. Nixon in my mind at the time being, because, as I had said before, I have learned it was seven o'clock and I didn't know whether it was seven or seven-thirty that they went to work, but I have learned since then that in the summer time they do go to work at seven o'clock.

Q. When you started from Warminster with a clear track to Gladstone, that only referred to trains and cars &c., being absent from the track, didn't it?

A. That is all.

Q. That did not intimate to you that there might be some foreign obstruction on the track, I mean something might have fallen on the track or a wagon might have broken down at the crossing, that had no reference to anything of that sort?

A. No, sir.

[fol. 242] Q. Where was the closest public crossing to the place where the accident happened; there is one just beyond it, isn't there?

A. I should think it would be Midway.

Q. Dou you remember whether or not you blew for that?

A. Yes, sir, I did.

Q. You were hauling ten empty coal cars?

A. Yes, sir.

Q. Is that the kind of car that *us* usually called a gondola, they are not very high, not as high as box cars, are they?

A. No, sir, that is the idea.

Q. And travelling at twenty-five miles an hour, within how many feet could you have stopped that train?

A. I might have stopped it, or I should have stopped it, in 500 feet.

Q. I think it is in evidence here that there was a straight view for something like thirteen hundred and some feet, so if you had seen a man ahead of you, you could have stopped?

A. Yes, sir.

Q. Now you have a danger signal that you make with the whistle?

A. Yes, sir.

Q. You give a toot, toot, toot, toot, that is the danger signal?

A. Yes, sir.

Q. And that is known by everybody and more especially by every train man?

A. Yes, sir.

Q. And you could have done that in a second?

A. I could have done it and would have done it.

Q. And Mr. Nixon was a strong, healthy man, and he could have jumped off that tricycle in a second or so?

A. Yes, sir, but if Mr. Nixon had been paying the proper attention that he should for the protection of his own life, there is no reason to doubt that he could have gotten off. Mr. Drysdale, you know that a man on a velocipede is supposed to look out and protect himself as much as the man that is operating the engine has to look out for him.

Q. Granting that, but suppose something takes that man's attention and he is not keeping a lookout for himself and you see him and you see his back is towards you at the time, and——

A. Then I would have sounded my whistle and tried to stop the train.

Q. Exactly, if you had seen Sam Joe Nixon on that tricycle fac- [fol. 243] ing a head wind, and apparently using all of his en-

deavors to propel himself forward and you had seen from that attitude he did not know the train was approaching you would have notified him?

A. No doubt in the least I would have done so.

Q. And if he had not jumped off immediately you would have stopped the train?

A. I certainly would.

Q. You spoke of the fireman firing his engine from his seat box, I think.

A. Yes, sir, operating the valve from the seat box.

Q. While he is doing that can he keep a lookout?

A. No, sir, not very well.

Q. But he is on the seat box when he is doing this work?

A. Yes, sir, but when he wants to increase or decrease the speed of the stoker he has to lean over and get hold of this valve and that takes him away from the side of the cab window.

Q. There are several ladies present in the court room, Mr. Reardon, but I want to ask you this question. I think you said for about a mile or so before you got to this place where you got on to the box to look out, you were obeying a call of nature?

A. That is right.

Q. Who was keeping a lookout then?

A. On my side?

Q. No, who was keeping a lookout on the engine while you were obeying this call?

A. I suppose the fireman was. I told you I started——

Q. Never mind about that, the point I want to make is, did you tell the fireman to keep a lookout for that mile or so?

A. I couldn't answer the question to save my life. Is there any use asking the fireman to come over on your seat box where he can look out just because you vacate that box, than there is to let him sit on his own box.

Q. Well, was he keeping a lookout at all on his side?

A. I should say undoubtedly he was, because he was an experienced man.

Q. Do you know he was—he himself testified he was not?

A. I wouldn't go on oath and say he was.

Q. And you didn't ask him?

A. No, sir, I didn't ask him.

Witness stands aside.

[fol. 244] C. F. Hollis sworn for defendant.

Direct examination.

By Mr. Long:

Q. What is your occupation?

A. Fireman.

Q. In the employment of the Chesapeake & Ohio Railway Company?

A. Yes, sir.

Q. How long have you been in the employment of that company?

A. I am in my fourteenth year.

Q. Have you been promoted from the position of fireman to engineer?

A. Yes, sir.

Q. Have you operated an engine as an engineer yet?

A. Yes, sir.

Q. Were you the fireman operating with Mr. Reardon when Mr. Nixon was killed some two years ago?

A. Yes, sir.

Q. You were on that engine?

A. Yes, sir.

Q. You had come up from Richmond with him?

A. Yes, sir.

Q. Where did you start on your run?

A. Richmond.

Q. Do you remember at what time you left Warminster, just east of the Nixon house?

A. About 6:30.

Q. Do you recall what the engineer, Mr. Reardon, was doing just as he approached and continued to be doing, and after he had passed the Nixon house?

A. He was standing up on his seat box looking at his lubricator.

Q. About what point did he take that position?

A. I couldn't tell you exactly the point but it was just a little east of their house.

Q. Did you understand what he was doing?

A. Yes, sir.

Q. Did you see what he was doing?

A. Yes, sir.

[fol. 245] Q. Had you ever seen him do it before?

A. Many a time.

Q. Do you know whether or not he was in the habit of doing it on every trip?

A. Yes, sir.

Q. Do you understand the purpose he had or the necessity for doing it?

A. Yes, sir, I do.

Q. When he was engaged in that act what was your position in the cab where were you?

A. I was on my seat box.

Q. On the opposite side of the cab?

A. Yes, sir.

Q. Seated where you could look out of your front window?

A. Yes, sir.

Q. Was there any obstruction in front of your window that would prevent your seeing the track ahead of you?

A. Yes, sir, there is two large air compressors.

Q. Do you recall what you, yourself, were doing in connection with your own work?

A. No, sir, I don't.

Q. Did you understand how long Mr. Reardon would probably be engaged in looking at the lubricator?

A. Not exactly, no, sir.

Q. You knew about how long it would take him?

A. I knew it would take possibly two or three minutes.

Q. What were your duties in the cab that would occupy you?

A. Numerous duties.

Q. Don't go into detail, but give the jury some general idea of what you had to do?

A. I might be regulating the stoker.

Q. Mr. Reardon has explained to the jury this part of the engine and has stated that this engine had on it an automatic stoker by means of which the coal was carried automatically from the tender and distributed in the fire-box. Did that operate under your supervision?

A. Yes, sir.

Q. Did that require any degree of attention from you?

A. It required constant attention.

Q. Was there anything else you had to do on your side of the cab?

[fol. 246] A. Operate the stoker and probably some of the parts would be stopped up and I would have to open them.

Q. Your principal duties were with the maintenance of the fire in the engine-box?

A. Yes, sir.

Q. You had to see to the maintenance of a uniform fire in the fire-box?

A. Yes, sir.

Q. Did you have any other appliance on your side that you had to look after besides this automatic stoker, anything in connection with the supply of water or anything of that sort, to the engine?

A. Not exactly that.

Q. Was there anything in the circumstances as they appeared to you at that time to suggest to you it was important for you to look out to the front?

A. Not that I know of.

Q. You knew the situation, didn't you?

A. Yes, sir.

Q. You were a fireman of long experience?

A. Yes, sir.

Q. Did you know that locality?

A. Yes, sir.

Q. In order to see the track ahead of you, or ahead of your engine, what would it have been necessary for you to do?

A. Lean out of my side window.

Q. And you would have had your attention entirely diverted from your proper work in the cab?

A. Yes, sir.

Q. You would have had to put your head clear out of the window to look ahead?

A. Yes, sir.

Q. Was there anything in the situation, as you understood it, that made you think you ought to do that?

A. No, sir.

Q. During the time when Mr. Reardon was engaged in examining the lubricator there was no one looking ahead except such looking ahead as you could do through your cab window?

A. No, sir.

Q. At that particular point of time then no lookout was maintained?

A. No, sir.

Q. Does that condition of things occur frequently or infrequently during the course of the run?

[fol. 247] A. Very frequently.

Q. When did you first hear of Mr. Nixon's death?

A. When I arrived at the terminal, at Gladstone.

Q. When you heard of his death did you recall the circumstances or situation as it was in your engine at the time when he was killed?

A. I remembered that about that point the engineer was on his seat box.

Q. You went over your work and his work at that point or reviewed it.

A. Yes, sir.

Q. Did it seem to you in that review that anything had been done that could be regarded as negligence?

A. No, sir.

Q. What happened in the cab was consistent with a careful operation of the train?

By Mr. Drysdale: I object to that because it is only a matter of opinion.

By the Court: He cannot testify as to his opinion, he can only give the facts.

By Mr. Drysdale: That is the point I want to make, your Honor.

By Mr. Long:

Q. You did not have any knowledge of the fact that you had struck a man until you had gotten to Gladstone?

A. No, sir.

Q. Did you have any reason, you or Mr. Reardon, so far as you know, have any reason to expect that Mr. Nixon would be on the track at that time?

A. No, sir.

Q. Or that anybody else would be on the track at that point?

A. No, sir.

Q. Was that a good place for the attention of the engineer and fireman to be diverted to some proper work inside the cab?
A. I considered it was one of the safest places on the road.

[fol. 248] Cross-examination.

By Mr. Drysdale:

Q. Do you, as an experienced railroad man, give this jury your opinion that one of the safest places on the railroad for an engineer and fireman to withdraw their lookout ahead to be on a curve where you cannot see ahead for any considerable distance whatever?
A. How is that?
Q. I understand that this place was on a curve, just as you were approaching Mr. Nixon's house, that was on a curve?
A. Yes, sir.
Q. And neither you or the engineer could see ahead on the track for any considerable distance, and that is the place Mr. Reardon chose to examine the lubricator and you say you consider that one of the safest places on the road to do that?
A. Yes, sir.

By Mr. Long: May I interrupt the examination to ask one question that I omitted, Mr. Drysdale.
By Mr. Drysdale: Go ahead.

By Mr. Long:

Q. Mrs. Nixon states that as your engine passed by her house she saw you and Mr. Reardon engaged in a conversation and laughing and talking together. Please state whether or not she is correct in that statement?
A. She is incorrect.
Q. She is mistaken about it?
A. She is mistaken.

By Mr. Drysdale:

Q. It is in evidence here, Mr. Hollis, that the track for some 1300 feet or more looking to the place where Mr. Nixon was killed was straight and there was nothing to obstruct the vision. Do you know whether that is correct, or not?
A. That *is* was straight?
Q. Yes, after your engine passed Mrs. Nixon's house, you very shortly got on to the straight part of the track where you could see ahead a half a mile, couldn't you?
[fol. 249] A. By leaning out of the cab window, yes, sir.
Q. What would you see if you were on the straight track and looking right out of your window?
A. The pumps on the left side, the air compressors.
Q. Do you tell this jury that neither the engineer nor fireman can see straight ahead on a straight track through the window provided for the purpose?

A. No, sir.

Q. They cannot?

A. I didn't tell the jury that.

Q. Just straighten that out then, I want to know about it?

A. The en*ig*neer can see through his window provided he is on the seat box.

Q. If Mr. Reardon then had been sitting on his seat box when you entered the straight track a little bit west of Mr. Nixon's house and Sam Joe Nixon had been on the track in front of Mr. Reardon, he would have seen him, wouldn't he?

A. Yes, sir.

Q. Now you were not really keeping a lookout at that time were you?

A. I don't think I did, I had other duties to perform.

Q. So that the train was running blind, with neither you or the engineer keeping a lookout at the time Mr. Nixon was killed. That is right, isn't it?

A. I couldn't see Mr. Nixon, and I didn't see him.

Q. That is not my question. My question is, you know the point where he was killed?

A. I think I do.

Q. Neither you or the engineer was keeping a lookout as you approached that point?

A. I might have been looking out of my front window and I could not have seen him because I cannot see through a wall, and the air compressors are the same as a wall in front of me.

Q. You couldn't have seen him?

A. No, sir.

Q. Then if you could not have seen him and no lookout was being kept for him, you could have seen him by looking or leaning out of the window, couldn't you?

A. By taking my attention from my work I could have been keeping a lookout.

Q. Now let me get that straight once again. Do I understand you to say when you are in your proper position on the left of the engine [fol. 250] and trying to look ahead of you on a straight track you cannot see straight ahead out of the window?

A. I could see out of the window, but not any further than the pumps.

Q. So you might as well have your eyes closed as open, as far as any practical lookout is concerned?

A. As far as seeing the track ahead of the engine.

Q. The further you look ahead of you the wider becomes your view doesn't it?

A. No, sir.

Q. As a matter of fact, I think you said a while ago you did not recall what you were doing at this particular time?

A. No, sir.

Q. You do not recall?

A. No, sir.

Q. After you left Warminster how many miles had you to travel to get to Mr. Nixon's house?

A. About a mile.

Q. What had Mr. Reardon, the engineer, been doing during that mile?

A. Coming around the bluff there he had blowed his whistle. He had been in the gangway and came back and blowed his whistle.

Q. Had he been keeping a lookout?

A. Yes, sir, as far as I know.

Q. You don't remember anything else he did at that time?

A. After blowing the whistle he got up on the seat box.

Q. I am speaking about this mile from Warminster to that point?

A. It would be a hard question for me to answer. I have other work and I couldn't sit there and watch him to see what he was doing continuously.

Q. Do you recall what he was doing during that mile?

A. No, sir, only the regular routine work.

Q. You don't remember whether you were keeping a lookout during that mile, do you?

A. Me keeping a lookout?

Q. Yes, sir.

A. No, sir.

Q. And sitting on your seat box and operating the valves that in turn operate the stoker you keep a partial lookout during that time?

A. Through my front window only and I can only see as far as the pumps.

Q. That means you cannot see the track at all?

[fol. 251] A. That is it exactly.

Q. You told Mr. Long, I think, in answer to about the last question he put to you that an engine running blind happens very frequently and that no one is keeping a lookout?

A. Yes, sir.

Q. How frequently does that happen?

A. I don't know.

Q. Does it happen every few miles or every few minutes, or how often does it happen?

A. That would be a question I cannot answer.

Q. But it does happen very frequently?

A. It happens frequently.

Witness stands aside.

Defendant rests.

REBUTTAL TESTIMONY OFFERED BY PLAINTIFF

Mrs. ANNIE NIXON, Plaintiff, recalled.

By Mr. Drysdale:

Q. Mrs. Nixon, you have already testified in this case and you have heard the other witnesses testify. Are you prepared to say whether or not that train blew its whistle about the time it was approaching your house or between the bluff and your house?

A. No, sir, it did not.

Q. I am sorry to have to go back to that cow, Mrs. Nixon, but I have to do it. Some of the witnesses testified, I have forgotten who they were, that the *gra*age where you have said the feed was kept belonged to Mrs. Robertson. Who is Mrs. Robertson?

A. Mrs. Glover.

Q. Do you mean that she was Mrs. Glover and she has changed her name to Mrs. Robertson since that time?

A. Yes, sir.

Q. Did you use that garage for keeping feed for your cow?

A. I did.

Q. By the way, was it your cow, or your husband's cow?

A. My cow.

[fol. 252] Q. How did you come to use that garage. Tell the contract there was between you and the owner, if any?

A. Mrs. Glover furnished us the land to build the garage on and she said if we did not need the garage and gave it up the house was hers, but we bought the lumber and had the house put up on her land.

Q. And as long as you chose to use it it would be yours, and when you abandoned it, it was to be hers?

A. Yes, sir.

Q. And you have abandoned it?

A. Yes, sir.

Q. It is scarcely worth while asking you again, but do you still adhere to your statement that the calf was born on Sunday and your husband was killed the following Tuesday?

A. Yes, sir, the calf was born on Sunday, the 19th.

Q. You have stated that the cow was dry. During a part of the time were you getting milk from any source?

A. Yes, sir, I got milk occasionally from Mrs. West.

Q. Do you recall whether or not you got any milk on or about the day your husband was killed?

A. Yes, sir, I got milk that evening and he was killed that morning.

Q. From Mrs. West?

A. Yes, sir.

Q. Mrs. West has testified that she called on you within a few hours, as I understood, of the time your husband was killed and that you had a certain conversation with her. Do you recollect that Mrs. West did call?

A. Yes, sir, she came to me.

Q. She says that you told her that you thought Sam might be killed but hoped he had escaped, or something of that kind. What did you say, if you recollect?

A. I said "Sam is dead," as well as I can recollect.

Q. When Mrs. West called on you how long was it after your husband was killed. Do you recollect the hour Mrs. West called on you?

A. It was about 8 or 8:30, or somewhere along there.

Q. That was about an hour and a half or two hours after your husband was killed?

A. Yes, sir.

Q. What was the state of your mind at that time?

I mean is your mind very clear as to what happened and were you calm or cool or were you agitated, or what?

[fol. 253] A. I was excited.

Q. And you have no recollection of telling Mrs. West that you did not know your husband was killed until the colored men called on you?

A. No, sir.

Q. Now when the colored men did call on you did you go towards them to talk to them?

A. I was standing in the yard when they came up.

Q. And you say you knew at that time your husband had been killed?

A. Yes, sir.

Q. Do you recollect what conversation you had with any of the men?

A. No, sir, but they told me he was dead, and that was all that I can remember.

Q. They told you he was dead?

A. Yes, sir.

Q. Now a good deal has been said about those buckets. You testified on your examination in chief that Mr. Nixon had no bucket with him except his dinner bucket, I think?

A. Yes, sir.

Q. Can you tell whether or not this is his dinner bucket?

A. No, sir, I cannot without the top.

Q. It was one like that, was it?

A. Yes, sir, it was one like that, but I couldn't identify that because I haven't the top.

Q. Could you identify the top, if so, by what means?

A. I scratched his name "Nixon" with a pocket knife so I could identify it from the colored men's buckets.

Q. They say this is a milk bucket?

A. Yes, sir.

Q. Do you know whether or not that is your milk bucket?

A. No, sir, I think not.

Q. Tell the jury why you think not? Was there any particular mark on your milk bucket that you could identify it by?

A. Yes, sir.

Q. Tell us what it was.

A. I used a "mend-it" on it.

Q. I don't know whether the gentlemen know what that is. You have one of those things with you, just show it to the jury.

(Witness does so.)

[fol. 254] By Mr. Drysdale: You gentlemen will notice what this is. You take this off, as I understand, and put this through and put this on the inside and tighten it up and if there is a hole that will stop it. Is that true, Mrs. Nixon?

A. Yes, sir.

Q. Was there one of those things on it at the time?
A. Yes, sir.
Q. You are quite sure of that?
A. Yes, sir.
Q. And this has not any on it?
A. No, sir.
Q. I will put that in evidence so that the jury can see it. That is the little nut for tightening it, isn't it?
A. Yes, sir.
Q. How long have you been using those things?
A. About four years, or rather I have been using them ever since I was housekeeping, about eight years.
Q. Something has been said about a colored man bringing up the milk to your house, &c. Is there any truth in that?
A. No, sir.
Q. And you still maintain your statement that you did the milking?
A. Yes, sir.
Q. What time did you usually do it?
A. Between 7.30 and 8.30.
Q. In the morning?
A. Yes, sir.
Q. And then again in the evening?
A. Yes, sir.
Q. Did you use any of the milk within ten days after the cow became fresh?
A. No, sir.
Q. Something was said about giving it to your pigs. Did you have any pigs at that time?
A. We had pigs, but we didn't use the milk for that purpose. We didn't milk the cow at that time.
Q. You didn't milk the cow at all at that time?
A. No, sir.
Q. I think Mrs. Desper testified that she called on you the day your husband was killed?
[fol. 255] A. Yes, sir.
Q. Do you recollect that she called?
A. No, sir, I don't.
Q. What did you say to Mrs. Desper—did you tell her that you didn't know your husband was killed until you were notified by the track men?
A. No, sir.
Q. Did you tell her that you told Essie you hoped your husband had escaped?
A. No, sir.

Cross-examination.

By Mr. Long:

Q. It has been testified that the cow was put in Mr. Dunn's pasture about the first of May. Is that correct?

A. I think so.
Q. Did you milk her after that and before your husband's death?
A. No, sir, she was dry.
Q. And you did not milk her during all the time she was up in that pasture, you never milked her any more, did you?
A. Not that month.
Q. Didn't you sell the cow before you ever milked her?
A. Yes, sir, I did.
Q. Then you never milked her again?
A. No, sir.
Q. So the cow wasn't milked at all from the first of May on until after Mr. Nixon's death?
A. No, sir.
Q. You did no milking during that year, from the first of May?
A. Yes.
Q. You did?
A. I did the milking that fall.
Q. You sold the cow before the fall?
A. I mean the fall before that. She was dry two months before she was fresh.
Q. The time when you did the milking was the year before, wasn't it, and it wasn't the year Mr. Nixon was killed, but it was the year before that?
A. She was dry April and May.
Q. When was the last time you did milk at Midway?
[fol. 256] A. It was about the last of March—no, we had the cow down home then, I beg your pardon, no, I didn't milk the cow that year up in the pasture.

Witness stands aside.

GEORGE CUNNINGHAM recalled.

By Mr. Drysdale:

Q. I believe you told us on your examination yesterday that you lived in the same neighborhood as Mrs. Nixon?
A. Yes, just the river between us.
Q. How long have you known Mrs. Nixon?
A. About eight years.
Q. Eight years last past?
A. Yes, sir.
Q. Do you know the same people she knows?
A. Yes, sir, a good part of them I do.
Q. Do you know what her reputation is in the community for truth and veracity—is it good or otherwise?

Objection. Overruled. Exception.

A. I never heard anything to the contrary.
Q. You have known her for eight years and you knew her for six years before Mr. Nixon's death?
A. Yes, sir.

Q. And you have never heard her veracity, in other words, her capacity for telling the truth, you never heard that questioned?
A. I never heard it mentioned either way.
Q. Are you prepared to tell this jury that she stood well in the community in that respect?
A. She did, as well as anyone I knew.

By Mr. Long:

Q. Mrs. West's reputation was also good, wasn't it?
A. Yes, sir.
Q. And Mrs. Desper's also?
A. Yes, sir.
Q. And these other men from that neighborhood that have testified also have a good reputation, haven't they?
[fol. 257] A. Yes, sir, as far as I know.

Witness stands aside.

JAMES CUNNINGHAM recalled.

By Mr. Drysdale:

Q. I think you told us that you lived in the same neighborhood that Mr. and Mrs. Nixon lived in?
A. Yes, sir, right near by.
Q. And I think you told us also you were related to Mr. Nixon, and that he was you nephew?
A. Yes, sir.
Q. Tell the jury whether or not you know the people that Mrs. Nixon mingled with and know generally the people in that neighborhood?
A. Yes, sir, I never heard any complaint about her, she stood well in that neighborhood.
Q. I am only speaking about her character for telling the truth.
A. I never heard anything contrary of it, only what I heard in the courthouse. She stood as high in the neighborhood as anybody I know of.

Cross-examination.

By Mr. Long:

Q. And you never heard anything affecting the reputation for veracity of any of these witnesses that have testified in this case, have you?
A. No, sir, she was a school teacher down there for several years before she was married.

Witness stands aside.

STUART HUGHES recalled.

By Mr. Drysdale:

Q. I think you too said that you had lived in the same neighborhood with Mrs. Nixon for a good many years?
A. About eight years.
[fol. 258] Q. Do you know what her reputation is in that neighborhood for truth and veracity; is it good or bad?
A. Good, as far as I know.
Q. You are not related to her in any way?
A. No, sir.

Cross-examination.

By Mr. Long:

Q. Do you know anything to the detriment of the reputation for truth and veracity of any of these witnesses who have testified in this case?
A. No, sir.

Witness stands aside.

W. N. H. HUGHES sworn.

By Mr. Drysdale:

Q. Where do you live?
A. At Midway.
Q. How long have you lived there?
A. All my life.
Q. How long have you known Mrs. Nixon?
A. Eight or nine years.
Q. Do you know what her reputation in the community for truth and veracity, was it good or bad?
A. Yes, sir, it was good.

Cross-examination.

By Mr. Long:

Q. Do you know anything to the detriment of the reputation for truth and veracity of any of the witnesses who have testified in this case?
A. No, sir.
Q. They all stand well?
A. Yes, sir.

Witness stands aside.

Plaintiff rests.

[fol. 259] REBUTTAL TESTIMONY OFFERED BY DEFENDANT

Mrs. T. J. WEST recalled.

By Mr. Long:

Q. Mrs. West, Mrs. Nixon spoke of getting milk from you on the day, I believe, of her husband's death or the day before. Please state what the fact is about that?

A. I am sure, I am positive she sent for milk that night. I think it was after supper or just before dark, because hers had soured, but I don't remember letting her have any milk before that in the spring.

Q. You did let her have it the night of her husband's death because she said her milk was sour?

A. Yes, sir, because she had right much company.

Q. Did she buy it or did you give it to her?

A. I think I gave it to her.

Q. And you don't remember having supplied her with milk prior to that time?

A. No, sir.

By Mr. Drysdale:

Q. Who was the messenger that brought you that message?

A. There was some girls at her house, but I don't remember who they were.

Q. You don't know that that message was given to these girls, that her milk was sour?

A. That is what they told me. We had done our night's milking and my milk was fresh.

Q. Isn't it a fact that you had very frequently given Mrs. Nixon milk, about once a week?

A. Yes, sir, in the winter.

Q. Didn't you give it to her several times before that?

A. In the spring, I don't remember. It seems to me I have given her milk a few times, but it seems to me it was along in the winter.

Q. If Mrs. Nixon will say positively that on an average maybe of once a week before this time she had gotten milk from you, would you really say that was not true?

A. I don't remember because I gave so much milk away.

Q. You simply cannot recollect. All right, that will do.

Witness stands aside.

[fol. 260] Mrs. ANNIE NIXON recalled.

By Mr. Drysdale:

Q. Did you send that message that your milk was sour?

A. No, sir, I did not.

Q. I think you told the jury you had gotten milk several times that spring from Mrs. West?

A. Yes, sir, I had.

Witness stands aside.

End of all testimony.

It is agreed that the maps introduced in evidence may be presented with the transcript and used before the Court of Appeals without being copied into the record.

Teste, this 11th day of July, 1923.

B. T. Gordon, Judge.

The following instructions, of which the first ten were granted at the request of the plaintiff, and the last four at the request of the defendant, are all the instructions that were granted at the trial of this case.

INSTRUCTIONS GIVEN BY THE COURT

1

The Court instructs the jury that a mere license is one that is clothed with no right and to whom no invitation has been extended but who is upon the premises of another by permission or acquiescense.

2

The Court instructs the jury that a railroad company operating a train along its track must, consitsent with the other duties of the engineer and fireman thereon, keep a reasonable lookout for licensees on its track in front of a moving train or engine, and that this duty of lookout along the track in front of a moving train or engine, extends and applies to a sufficient radius of distance ahead to enable [fol. 261] the engineman to stop the train or engine by the exercise of reasonable care and diligence by the application of brakes or otherwise, should he discover a licensee on the tracks apparently unconscious of his denger from the approaching train and who apparently will take no steps to secure his own safety.

3

The court instructs the jury if you find from the evidence that the said Sam Joe Nixon was a licensee at the time of his death, and if you further find from the evidence that the servant in charge of the engine in question ought to have discovered, by the exercise of reasonable care in keeping a lookout for licensees on the track, the said Sam Joe Nixon, and if you further find that had the said servant or servants exercised the said reasonable care, Sam Joe Nixon would have been discovered in a position of peril from the approaching train and that the said Sam Joe Nixon at the time he ought to have

been discovered was unconscious of the approaching train and remained unconscious of the approaching train up to the time of the collision causing his death, and that the said servant or servants ought to have discovered the said Sam Joe Nixon at a sufficient distance to have warned him of his peril by bell or whistle, or to have [illegible] of necessary in time to have avoided injuring him then you should find for the plaintiff.

4

The court instructs the jury, if you find for the plaintiff, you cannot assess the damages in a sum exceeding ten thousand dollars ($10,000.00) if you further find from the evidence that the said Sam Joe Nixon was not engaged in interstate commerce at the time of his death, while if you further find from the evidence that the said Sam Joe Nixon was engaged in interstate commerce at the time of his death, you cannot assess the damages in a sum exceeding Twenty-five thousand dollars ($25,000.00).

5

The court instructs the jury, if you find for the plaintiff, you may direct in what proportion the damages assessed shall be apportioned among the surviving widow and children of Sam Joe Nixon.

[fol. 262]

6

The court instructs the jury, it is the duty of the engineer so far as consistent with his other duties to keep a lookout ahead for licensees and servants at such times and places as they may be expected to be on the track and if for any reason the engineer cannot keep a lookout, he should require the fireman to keep a lookout if, in the exercise of reasonable prudence, such requirement is necessary.

7

The court instructs the jury that every common carrier by railroad, while engaging in commerce between any of the several states is liable in damage to any person suffering injury, caused by its negligence, while he is employed by such carrier in such commerce or in case of the death of such employee to his or her personal representative for the benefit of the surviving widow or husband and children of such employee; that a railroad passing from the State of Virginia to the State of West Virginia and holding itself out to the public generally as one who undertakes for hire or reward to transport goods and passengers from the said State of Virginia to the said State of West Virginia as a public employment and does so transport goods and passengers, is a common carrier by railroad engaged in commerce between two of the several states; that all section men and track laborers while working on or repairing any part of the track or switches used by such common carrier by railroad indiscriminately,

for both interstate and intrastate commerce are employed in interstate commerce; that a section foreman, employed by such a common carrier, is an employee engaged in interstate commerce, while he is on the railroad premises, on his way to work, a reasonable time before his regular day's work begins, when he has been permitted to use premises by such railroad, on his way to work, and when his duties as section foremen require him to pass over the track as often as practicable.

8

The court instructs the jury if you find from the evidence that the defendant was a common carrier by railroad engaged in interstate commerce, at the time in question, and if you find that the said Sam Joe Nixon was regularly employed in such interstate commerce by the defendant, and was on the day in question, on the railroad premises, on his way to work, a reasonable time before his regular [fol. 263] day's work began, then you should find that the said Sam Joe Nixon was engaged about his services by a common carrier by railroad engaged in commerce between two of the several states, at the time of the accident complained of.

9

The court instructs the jury, if you find from the evidence that Sam Joe Nixon was a railroad employee on main line track at the time of his death, then the Court further instructs you that the railroad owed him the duty of keeping a reasonable lookout for him, so far as consistent with the other duties of the engineer and fireman operating the engine on said track.

10

The Court instructs the jury that in an action brought by an employee of a common carrier by railroad for injuries negligently inflicted, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

11

The Court instructs the jury that it is the duty of the engineer and fireman while operating an engine to look after all the machinery and appliances of said engine and to keep the same in such condition as is necessary for safe operation and running of said train.

12

The court instructs the jury that if they believe from the evidence that at the time of the accident in question the deceased was riding on a velocipede with the consent of the railway company but not at

the time engaged in the performance of any duty within the scope of his employment, and that the deceased, by the exercise of ordinary care could have seen or heard the train approaching him in time to have avoided the accident, and failed to do so, such failure on his part to take the necessary precautions for his own safety is contributory negligence and will bar his recovery in this action, but this instruction must be read in connection with Instruction No. 3.

[fol. 264] 13

The Court instructs the jury that if they believe from the evidence that the deceased was struck and killed by the defendant's train while he was riding a velocipede on defendant's track, and further believe from the evidence that the engineer and fireman in charge of the defendant's engine, which is alleged to have struck the deceased, were at the time said engine struck him, engaged in the performance of necessary duties in connection with the operation and running of said engine, which prevented them from seeing or warning the deceased, and that they did not know or in the exercise of due care could not have known of the presence of the deceased on the railroad track, then they must find for the defendant.

14

The court instructs the jury that unless they believe from the evidence that the plaintiff's intestate was killed as a result of some negligent act on the part of the defendant company, they must find for the defendant. The mere fact that an employee has been killed or injured by a railroad train does not justify the conclusion that the death or injury was negligently inflicted, but they must believe not only that the defendant has been guilty of negligence but also that the negligent act was the proximate cause of the death of the deceased. They are not permitted to indulge in mere surmise or speculation, but must find the fact from credible evidence.

The following instructions requested by the plaintiff were refused:

P-1

The court instructs the jury if you believe from the evidence that the defendant company had knowledge that the said Sam Joe Nixon had for a long time, to-wit: One year prior to June 21, 1921, been in the habit of using its velocipede over its tracks from his home on its right of way about one and a quarter miles east of its tool house at Midway to said tool house between the hours 6:30 and 7:00 A. M., then the knowledge that the said Sam Joe Nixon was likely to be on the section of track above mentioned at the time mentioned is imputed to its servants in charge of the train that killed said Nixon and the defendant is liable to the plaintiff for any damages to her decedent caused by the failure of said servant in charge of [fol. 265] said train, failing to keep a reasonable lookout for the said Nixon.

P-2

The court instructs the jury that an employee does not assume an unknown risk, and if you find from the evidence that the defendant negligently failed to keep a lookout for Sam Joe Nixon and that that negligence was perpetrated through a fellow servant of Sam Joe Nixon, the said Sam Joe Nixon did not assume the risk of said fellow servant failing to keep a lookout unless the said Sam Joe Nixon knew before the accident the said fellow servant would fail to keep a lookout at the time in question.

The following instructions requested by the defendant were refused:

D-1

The court instructs the jury that if they believe from the evidence that the deceased at the time of his death was on his way to Midway to milk his cow, according to his daily custom, and that he was not to go to work for the defendant company until he had completed this work of his own, the said deceased, during the time he was proceeding from his home to Midway, was not in the employ of the defendant company; and if the jury further believe from the evidence that the deceased, while proceeding from his home to Midway, failed to maintain a lookout for his own safety, and that such failure on his part contributed to his injury, then they are instructed that he was guilty of contributory negligence and the plaintiff cannot recover in this action.

D-2

The court instructs the jury that the employees of a Railway Company engaged in the maintenance and repair of a railroad track, whose business it is to keep the track in safe condition for the movement of trains, must maintain a lookout at all times for the approach of such trains and for their own safety, and the employees operating such trains have the right to assume that the track employees will keep the track free from obstructions, and consequently they owe no duty to such track employees of maintaining a lookout for them [fol. 266] or of warning them of the approach of the train.

D-3

The court instructs the jury that in order to recover in this action, the plaintiff must show by affirmative proof that the death of her intestate, S. J. Nixon, was caused by the negligence of the defendant, and that such negligence cannot be inferred from the accident itself, nor from the fact taken by itself that the engine crew did not see him on the track ahead of the engine.

D-4

The court instructs the jury that an employee of a railway company in accepting employment as a section foreman thereon, assumes

all the ordinary risks that are necessarily and normally incident to the occupation in which he engages, whether the employee is actually aware of such risks or not. And if the jury believe from the evidence that the railway company customarily ran its trains over its tracks at or near the point of the accident in question at any time in either direction, and without maintaining a look-out for track men at such times as the engineer and fireman were engaged in the performance of necessary duties about the engine, then they are instructed that the plaintiff's intestate likewise assumed the risk of danger from such cause, and the plaintiff cannot recover in this action.

D-5

The court instructs the jury that notwithstanding they may believe from the evidence that if the engineer had been keeping a look-out he could have seen the defendant's intestate in time to have stopped the train and avoided the accident, his failure to keep such lookout cannot be imputed to the defendant as negligence if they also believe from the evidence that th- engineer in the exercise of reasonable care on his part was at the time engaged in the discharge of other necessary duties and therefore could not maintain such lookout.

To the giving of the first ten instructions requested by the plaintiff, and to the action of the court in refusing to give the instructions requested by the defendant, including its refusal to give Instuction No. 12, without the words, "but this instruction No. 3," which words were added by the Court, the defendant excepted.

[fol. 267] The plaintiff excepted to the giving of instructions 11, 12, 13, and 14, requested by the defendant, and to the refusal of the Court to give instructions P-1 and P-2, requested by her, and to the amendment of the sixth instruction, by substituting in place of the words "if practicable," the words "if in the exercise of reasonable prudence, such requirement is necessary."

Teste, this 11th day of July, 1923.

B. T. Gordon, Judge.

IN CIRCUIT COURT OF NELSON COUNTY

[Title omitted]

NOTICE OF MOTION FOR JUDGMENT

To the Chesapeake and Ohio Railway Company:

Take notice that on the first day of the March Term, 1922, of the Circuit Court of the County of Nelson, Virginia, I shall move the said court, at the courthouse thereof, for judgment against you for the wrongful death of Sam Joe Nixon, who was negligently killed by you, and for whose estate I have been duly appointed personal representative; that is to say.

(1) On the to-wit 21st day of June, 1921, you were a common carrier by railroad, engaged in intrastate commerce within the Commonwealth of Virginia, and the said Sam Joe Nixon was in your employ and engaged in said intrastate commerce in the capacity of a servant and as said servant was employed as a section foreman on that part of your railroad which runs through Nelson County, Virginia, and while the said Sam Joe Nixon was acting in the course of his employment as your servant he was, on the 21st day of June, 1921, killed by the negligence of your agents and servants, the said negligence of your agents and servants consisting of this: On the morning of the said 21st day of June, 1921, the said Sam Joe Nixon left his home and in the course of his employment with you, and with your knowledge, was travelling on your railroad tracks (ig-[fol. 268] norant of the approach of the hereinafter mentioned train) on a railroad tricycle to his tool house (the said tricycle having been furnished him by you, and he having been invited and permitted by you to use said tricycle on your tracks as a means of travelling from his said home to said tool house and the said Sam Joe Nixon being required by the rules of your railroad Company to pass over this section of your track as often as practicable and to know that it was in a proper and safe condition), when at about the hour of 6:30 a. m. and at a place on your railroad in to-wit Nelson County, Virginia, near that point known as your to-wit 101-mile post from Richmond, the said Sam Joe Nixon was run down by the negligence of your agents and servants in charge of a locomotive drawing one of your extra freight trains going west, said freight train being known as to-wit No. 1008, the said negligence of your said agents and servants consisting in their failing to keep a reasonable lookout for the said Sam Joe Nixon by reason of which said negligence the said Sam Joe Nixon was then and there killed. Wherefore damages have been sustained to the amount of Ten Thousand Dollars ($10,000.00) and I, by virtue of the statute for such cases made and provided, have the right to recover the same from you.

And for this also, to-wit:

(2) On the to-wit 21st day of June, 1921, you were a common carrier by railroad, engaged in intrastate commerce, within the Commonwealth of Virginia, and the said Sam Joe Nixon was in your employ and engaged in said intrastate commerce in the capacity of a servant and as said servant was employed as a section foreman on that part of your railroad which runs through Nelson Co. Virginia, and while the said Sam Joe Nixon was acting in the course of his employment as your servant he was, on the to-wit 21st day of June, 1921, killed by the negligence of your agents and servants the said negligence of your agents and servants consisting of this: on the morning of the said 21st day of June, 1921, the said Sam Joe Nixon left his home and in the course of his employment with you, and with your knowledge, was travelling on your railroad tracks on a tricycle to his tool house, ignorant of the approach of the hereinafter mentioned train (the said tricycle having been furnished him by you, and he having been invited and permitted by you to use said

tricycle on your tracks as a means of travelling from his said home to said tool house and the said Sam Joe Nixon being required by the rules of your railroad company to pass over this section of your track as often as practicable and to know that it was in a proper and safe condition), when at about the hour of 6:30 a. m. and at a place on [fol. 269] your railroad in to-wit Nelson County, Virginia, near that point known as your to-wit 101-mile post from Richmond, the said Sam Joe Nixon was run down by the negligence of your agents and servants in charge of one of your extra freight trains going west, said freight train being known as to-wit No. 1008, the said negligence of your said agents and servants consisting of their failing to give a suitable signal to notify the said Sam Joe Nixon of the approach of the said train after the danger of the said Sam Joe Nixon became known, or should have become known to your said agents and servants had they exercised ordinary care in discovering the said Sam Joe Nixon in a dangerous position on your track, by reason of which negligence the said Sam Joe Nixon was then and there killed. Wherefore damages have been sustained to the amount of Ten Thousand Dollars ($10,000.00) and I, by virtue of the statute for such cases made and provided, have the right to recover the same from you.

And for this also, to-wit:

(3) On the to-wit 21st day of June, 1921, you were a common carrier by railroad, engaged in intrastate commerce within the Commonwealth of Virginia, and the said Sam Joe Nixon was in your employ and engaged in said intrastate commerce in the capacity of a servant and as said servant was employed as a section foreman on that part of your railroad which runs through Nelson County, Virginia, and while the said Sam Joe Nixon was acting in the course of his employment as your servant he was, on the to-wit 21st day of June, 1921, killed by the negligence of your agents and servants consisting of this: on the morning of the said 21st day of June, 1921, the said Sam Joe Nixon left his home and in the course of his employment with you, and with your knowledge, was travelling on your railroad tracks (ignorant of the approach of the hereinafter mentioned train) on a tricycle to his tool house (the said tricycle having been furnished him by you, and he having been invited and permitted by you to use said tricycle on your tracks as a means of travelling from his said home to said tool house and the said Sam Joe Nixon being required by the rules of your railroad company to pass over this section of your track as often as practicable and to know that it was in a proper and safe condition), when at about the hour of 6:30 a. m. and at a place on your railroad in to-wit Nelson County, Virginia, near that point known as your to-wit 101-mile post from Richmond, the said Sam Joe Nixon was run down by the negligence of your agents and servants in charge of one of your extra freight trains going west, said freight train being known as to-wit No. 1008, the said negligence of your agents and servants consisting in their [fol. 270] failing to keep a constant lookout ahead for obstructions which said constant lookout for obstructions was a duty required of your said agents and servants, your said agents and servants being

enginemen and required by the rules of your railroad company to so keep a constant lookout and the said Sam Joe Nixon being also a servant was relying upon the faithful performance of said rules at the time of the infliction of the said negligent acts causing his death, by reason of which said negligence the said Sam Joe Nixon was then and there killed. Wherefore damages have been sustained to the amount of Ten Thousand Dollars ($10,000.00) and I, by virtue of the statute for such cases made and provided, have the right to recover the same from you.

And for this, also, to-wit:

(4) That for a long period of time prior to the to-wit 21st day of June, 1921, the said Sam Joe Nixon had habitually travelled on a tricycle on your railroad from his home, located on your premises near to-wit Midway Mills to his tool house, located on your premises near to-wit Midway Mills, and in returning to his said home, when going to and returning from his place of work as your servant and said — used by him of your railroad tracks was known to, consented to and acquiesced in by you without objection on your part, and while the said Sam Joe Nixon was enjoying said license from you to so use your tracks and was travelling on your railroad tracks in Nelson County, Virginia, near that point on your railroad known as your to-wit 101 mile post from Richmond, on the said tricycle, on the to-wit 21st day of June, 1921, ignorant of the approach of the hereinafted mentioned train, he was, on the said 21st day of June, 1921, about 6:30 o'clock a. m. killed by the negligence of your agents and servants operating one of your extra freight trains going west, said freight train being known as to-wit No. 1008 the said negligence of your agents and servants consisting in the failure of your agents and servants in charge of the locomotive pulling said train to keep a reasonable lookout for licensees upon your tracks, by reason of which said negligence the said Sam Joe Nixon was, while riding said tricycle run down and killed by the said train; wherefore damages have been sustained to the amount of Ten Thousand Dollars ($10,000.00) and I, by virtue of the statute for such cases made and provided, have the right to recover the same from you.

And for this, also, to-wit:

(5) That for a long period of time prior to the to-wit 21st day of June, 1921, the said Sam Joe Nixon had habitually travelled on a tricycle on your railroad from his home, located on your premises near to-wit Midway Mills, to his tool house located on your premises [fol. 271] near to-wit Midway Mills, and in returning to his said home, when going to and returning from his place of work as your servant and said user by him of your railroad tracks was known to, consented to and acquiesced in by you without objection on your part, and while the said Sam Joe Nixon was enjoying said license from you to so use your tracks and was travelling on your railroad tracks in Nelson County, Virginia, near that point on your railroad known as your 101 mile post from Richmond, on the said tricycle, on the to-wit 21st day of June, 1921, ignorant of the approach of the

hereinafter mentioned train, he was, on the said 21st day of June, 1921, about 6:30 a. m. killed by the negligence of your agents and servants operating one of your extra freight trains going west, said freight train being known as to-wit No. 1008, the said negligence of your said agents and servants consisting in the failure of your agents and servants to give the customary signals to notify the said Sam Joe Nixon of the approach of the said train after the danger of the said Sam Joe Nixon became known or should have become known to your said agents and servants had they exercised ordinary care in discovering the said Sam Joe Nixon in a dangerous position on your tracks. Wherefore damages have been sustained to the amount of Ten Thousand Dollars ($10,000.00) and I, by virtue of the statute for such cases made and provided have the right to recover the same from you.

And for this also, to-wit:

(6) The said Sam Joe Nixon was on the to-wit 21st day of June, 1921, your servant and was as such servant designated and known as a section foreman on that part of your railroad running through Nelson County, Virginia, near that point known as your 101 mile post from Richmond; as such servant the said Sam Joe Nixon had been furnished a dwelling by you at a point on your railroad in Nelson County, Virginia, near to-wit Midway Mills, and the said dwelling being a distance of to-wit one and one-half miles from the tool house at which the said Sam Joe Nixon kept the tools for the gang of men employed by you to assist him in his said work as your servant on your said railroad and at which said tool house the said Sam Joe Nixon commenced and ceased his day's work as your servant, he, the said Sam Nixon was by you furnished a certain railroad tricycle and by you invited to use said tricycle on your railroad tracks when traveling from his said dwelling, to his said tool house and in traveling from his said tool house, and while the said Sam Joe Nixon, acting under the said invitation from you, was traveling on your said railroad tracks from his said dwelling to his said tool house on the [fol. 272] to-wit 21st day of June, 1921, at about 6:30 a. m. on the said day, ignorant of the approach of the hereinafter mentioned train, he was negligently killed by your agents and servants operating one of your extra freight trains going west, known as No. 1008, at a point on your railroad in Nelson County, Virginia, near that place designated by you as your 101 mile post from Richmond, the negligence of your agents and servants consisting of the failure of your agents and servants in charge of the locomotive pulling said train to keep a reasonable lookout for persons riding tricycles on your said track by your invitation, by reason of which negligence the said Sam Joe Nixon, at the place and time mentioned and while riding the said tricycle, was run down and killed by said train. Wherefore damages have been sustained to the extent of Ten Thousand *sand* Dollars ($10,000.00) and I, by virtue of the statute for such cases made and provided, have the right to recover the same from you.

And for this also, to-wit:

(7) That for a long period of time prior to the to-wit 21st day of June, 1921, the said Sam Joe Nixon had habitually travelled on a tricycle on your railroad track from his home located on your premises near to-wit Midway Mills in Nelson County, Virginia, to his tool house located on your premises near to-wit Midway Mills and had likewise used the said tricycle on your railroad track on returning to his said home from his said tool house after the completion of his day's work for you, and said user by him of your railroad tracks was known to, consented to and acquiesced in by you, without objection on your part and while the said Sam Joe Nixon was enjoying said license from you to so use your track and was travelling on your railroad tracks in Nelson County, Virginia, near that point on your railroad known as your 101 mile post from Richmond, on the said tricycle, on the to-wit 21st day of June, 1921, he was on the said to-wit 21st day of June, 1921, about 6:30 o'clock a. m. killed by the negligence of your agents and servants operating one of your extra freight trains going west, said freight train being known as to-wit No. 1008; the said negligence of your agents and servants consisting of this: At the time and place mentioned the said Sam Joe Nixon was travelling on a straight part of your railroad and it was then and there apparent from the attitude and manner of the said Sam Joe Nixon that he was unconscious of the approach of the said train and the danger therefrom, and the said Sam Joe Nixon could have been seen by your agents and servants in charge of said locomotive drawing said train for a distance of to-wit 800 *yars* and at a sufficient dis-[fol. 273] tance for your said agents and servants to have stopped the said train in time to have avoided injuring the said Sam Joe Nixon had your said agents and servants in charge of said locomotive drawing said train used ordinary care to keep a lookout to discover persons rightfully using your said tracks at the time and place mentioned, but your said agents and servants negligently failed to keep a lookout for the said Sam Joe Nxion, by reason of which said negligence the said Sam Joe Nixon was, while riding the said tricycle, run down and killed by the said train. Wherefore damages have been sustained to the amount of Ten Thousand Dollars ($10,000.00) and I, by virtue of the statute for such cases made and provided, have the right to recover the same from you.

And for this also, to-wit:

(8) The said Sam Joe Nixon was on the to-wit 21st day of June, 1921, your servant and was as such servant designated and known as a section foreman on that part of your railroad running through Nelson County, Virginia, near that point known as your 101 mile post from Richmond; as such servant the said Sam Joe Nixon had been furnished a dwelling by you at a point on your railroad in Nelson County, Virginia, near to-wit Midway Mills and the said dwelling being a distance of to-wit one and one-half miles from the tool house at which the said Sam Joe Nixon kept the tools for the gang of men employed by you to assist him in his said work as your servant on your said railroad and at which said tool house the said Sam Joe Nixon commenced and ceased his day's work as your servant, he the said Sam Joe Nixon, was by you furnished a certain rail-

road tricycle and by you invited to use said tricycle on your railroad tracks when travelling from his said dwelling to his said tool house and in travelling from his said tool house to his said dwelling, and while the said Sam Joe Nixon, acting under the said invitation from you, was travelling on your said railroad tracks from his said dwelling to his said tool house, on the to-wit 21st day of June, 1921, at about 6:30 a. m. on the said day, ignorant of the approach of the hereinafter mentioned train, he was negligently killed by your agents and servants operating one of your extra freight trains going west, known as No. 1008, at a point on your railroad in Nelson County, Virginia, near that place designated by you as your 101 mile post from Richmond, the said negligence of your said agents and servants consisting in the failure of your agents and servants to give the customary signals to notify the said Sam Joe Nixon of the approach of the said train after the danger of the said Sam Joe Nixon became known or should have become known to your agents and servants had they exercised ordinary care in discovering the said Sam Joe [fol. 274] Nixon in a dangerous position on your tracks. Wherefore damages have been sustained to the amount of Ten Thousand Dollars ($10,000.00) and I, by virtue of the statute for such cases made and provided, have the right to recover the same from you.

And for this also, to-wit:

(9) On the to-wit 21st day of June, 1921, you were a common carrier by railroad engaged in Commerce between the State of Virginia and the State of West Virginia, that is to say, on the said 21st day of June, 1921, you were the owner of and operating a railroad passing from the State of Virginia to the State of West Virginia, and held yourself out to the public generally as one who undertook for hire or reward to transport goods and passengers from the State Virginia to the State of West Virginia and did as a public employment transport goods and passengers by means of said railroad from the State of Virginia to the State of West Virginia; and on the said to-wit 21st day of June, 1921, one Sam Joe Nixon, who was the sole support of the hereinafter mentioned widow and children, was employed by you in said interstate commerce; that is to say, on the said day the said Sam Joe Nixon was your servant and as said servant was engaged in repairing your railroad tracks over which passed regularly your trains carrying goods and passengers from the State of Virginia to the State of West Virginia and while you were so engaged in said interstate commerce and while the said Sam Joe Nixon was so employed by you in said interstate commerce, the said Sam Joe Nixon was killed by the negligence of your agents and employees, that is to say, the said Sam Joe Nixon was in your employment as a section foreman and as said section foreman his duties required him to keep in repair that part of your railroad tracks running through Nelson County, Virginia, near to-wit Midway Mills, and over which you as a public calling regularly carried goods and passengers for hire from the State of Virginia to the State of West Virginia, and as said section foreman you had furnished him a certain dwelling house to be used as a home near Midway Mills, which said dwelling house was situated a distance of to-wit one and one-half miles from his tool

house at which said tool house the said Sam Joe Nixon regularly met his gang of fellow-servants for your company and with them went to work each working day repairing tracks over which you as a common carrier by railroad hauled goods and passengers from the State of Virginia to the State of West Virginia, and on the morning of the said to-wit 21st day of June, 1921, the said Sam Joe Nixon left the said dwelling house and in the course of his employment with you, and with your knowledge, was travelling on your railroad tracks ignorant [fol. 275] of the approach of the hereinafter mentioned train, on a railroad tricycle to his said tool house (the said tricycle having been furnished by you and he having been invited and permitted by you to use said tricycle on your tracks as a means of travelling from the said dwelling house to said tool house and the said Sam Joe Nixon being required by the rules of your railroad company to pass over this section of your track as often as practicable and to know that it was in a proper and safe condition) when at about the hour of 6:30 a. m. and at a place on your railroad in to-wit Nelson County, Virginia, near that point known as your to-wit 101 mile post from Richmond, the said Sam Joe Nixon was run down by negligence of your agents and employees in charge of the locomotive drawing one of your extra freight trains going west, said freight train being known as to-wit No. 1008; the said negligence of your said agents and employees consisting in their failing to keep a reasonable lookout for the said Sam Joe Nixon, by reason of which said negligence the said Sam Joe Nixon was then and there killed and the said Sam Joe Nixon being survived by a widow and children—to-wit: Annie Eliza Nixon (widow); Dorothy Nixon (child), age five; Mildred Nixon (child), age three; Mary Nixon (child), age three; Samuel Franklin Nixon (child), age fifteen months, and the said widow and children being deprived of their sole support by the death of the said Sam Joe Nixon, have suffered damages to the amount of Twenty-five Thousand Dollars ($25,000.00) by the said wrongful death at your hands of the said Sam Joe Nixon and I, having been regularly appointed personal representative of the estate of the said Sam Joe Nixon am entitled to recover the said damages from you for the benefit of the said widow and children in accordance with the statute for such cases made and provided.

And for this also, to-wit:

(10) On the to-wit 21st day of June, 1921, you were a common carrier by railroad engaged in commerce between the State of Virginia and the State of West Virginia, that is to say, on the said 21st day of June, 1921, you were the owner of and operating a railroad passing from the State of Virginia to the State of West Virginia, and held yourself out to the public generally as one who undertook for hire or reward to transport goods and passengers from the State of Virginia to the State of West Virginia, and did as a public employment transport goods and passengers by means of said railroad from the State of Virginia to the State of West Virginia; and on the said to-wit 21st day of June, 1921, one Sam Joe Nixon, who was the sole support of the hereinafter mentioned widow and children, was employed [fol. 276] by you in said interstate commerce; that is to say, on

the said day the said Sam Joe Nixon was your servant and as said servant was engaged in repairing your railroad tracks *ovre* which passed regularly your trains carrying goods and passengers from the State of Virginia to the State of West Virginia, and while you were so engaged in said interstate commerce the said Sam Joe Nixon was killed by the negligence of your agents and employees; that is to say, the said Sam Joe Nixon was in your employment as a section foreman and as said section foreman his duties required him to keep in repair that part of your railroad tracks running through Nelson County, Virginia, near to-wit Midway Mills and over which you as a public calling regularly carried good- and passengers for hire from the State of Virginia to the State of West Virginia, and as said section foreman you had furnished him a certain dwelling house to be used as a home near Midway Mills, which said dwelling house was situated a distance of to-wit one and one-half miles from his tool house at which said tool house the said Sam Joe Nixon regularly met his gang of fellow-servants for your company, and with them went to work each working day repairing tracks over which you as a common carrier by railroad hauled goods and passengers from the State of Virginia to the State of West Virginia, and on the morning of the said to-wit 21st day of June, 1921, the said Sam Joe Nixon left the said dwelling house and in the course of his employment with you, and with your knowledge, was travelling on your railroad tracks, ignorant of the approach of the hereinafter mentioned train, on a railroad tricycle to his said tool house (the said tricycle having been furnished by you and he having been invited and *premitted* by you to use said tricycle on your tracks as a means of travelling from the said dwelling house to said tool house and the said Sam Joe Nixon being required by the rules of your railroad company to pass over this section of your track as often as practicable and to know that it was in a proper and safe condition) when at about the hour of 6:30 a. m. and at a place on your railroad in to-wit Nelson County, Virginia, near that point known as your to-wit 101 mile post from Richmond, the said Sam Joe Nixon was run down by the negligence of your agents and employees in charge of the locomotive drawing one of your extra freight trains going west, said freight train being known as to-wit No. 1008; the said negligence of your said agents and employees consisting of their failing to give a suitable signal to notify the said Sam Joe Nixon of the approach of the said train after the danger of the said Sam Joe Nixon became known or should have become known to your said agents and employees had they exercised ordinary care in discovering the said Sam Joe Nixon in a dangerous position on [fol. 277] your tracks, by reason of which said negligence the said Sam Joe Nixon was then and there killed, and the said Sam Joe Nixon being survived by a widow and children, to-wit: Annie Eliza Nixon (widow), Dorothy Nixon (child), age five; Mildred Nixon (child), age three; Mary Nixon (child) age three; Samuel Franklin Nixon (child) age fifteen months, and the said widow and children being reprived of their sole support by the death of the said Sam Joe Nixon, have suffered damages to the amount of Twenty-five Thousand Dollars ($25,000.00) by the said wrongful death at your

hands of the said Sam Joe Nixon and I, having been regularly appointed personal representative of the estate of the said Sam Joe Nixon, am entitled to recover the said damages from you for the benefit of the said widow and children, in accordance with the statute for such cases made and provided.

And for this also, to-wit:

(11) On the to-wit 21st day of June, 1921, you were a common carrier by railroad engaged in commerce between the State of Virginia and the State of West Virginia, that is to say, on the said 21st day of June, 1921, you were the owner of and operating a railroad passing from the State of Virginia to the State of West Virginia, and held yourself out to the public generally as one who undertook for hire or reward to transport goods and passengers from the State of Virginia to the State of West Virginia and did as a public employment transport goods and passengers by means of said railroad from the State of Virginia to the State of West Virginia; and on the said to-wit 21st day of June, 1921, one Sam Joe Nixon, who was the sole support of the hereinafter mentioned widow and children, was employed by you in said interstate commerce; that is to say, on the said day the said Sam Joe Nixon was your servant and as said servant was engaged in repairing your railroad tracks over which passed regularly your trains carrying goods and passengers from the State of Virginia to the State of West Virginia and while you were so engaged in said interstate commerce and while the said Sam Joe Nixon was so employed by you in said interstate commerce, the said Sam Joe Nixon was killed by the negligence of your agents and employees; that is to say, the said Sam Joe Nixon was in your employment as a section foreman and as said section foreman his duties required him to keep in repair that part of your railroad tracks running through Nelson Co. Virginia near to-wit Midway Mills and over which you as a public calling regularly carried goods and passengers for hire from the State of Virginia to the State of West Virginia, and as said [fol. 278] section foreman you had furnished him a certain dwelling house to be used as a home near Midway Mills, which said dwelling house was situated a distance of to-wit one and one-half miles from his tool house at which said tool house the said Sam Joe Nixon regularly met his gang of fellow-servants for your company, and with them went to work each working day repairing tracks over which you as a common carrier by railroad hauled goods and passengers from the State of Virginia to the State of West Virginia, and on the morning of the said to-wit 21st day of June, 1921, the said Sam Joe Nixon left the said dwelling house and in the course of his employement with you, and with your knowledge, was travelling on your railroad tracks, ignorant of the approach of the hereinafter mentioned train, on a railroad tricycle to his said tool house (the said tricycle having been furnished by you and he having been invited and permitted by you to use said tricycle on your tracks as a means of travelling from the said dwelling house to said tool house and the said Sam Joe Nixon being required by the rules of your railroad company to pass over this section of your track as often as practi-

cable and to know that it was in a proper and safe condition; when at about the hour of 6:30 a. m. and at a place on your railroad in to-wit Nelson County, Virginia, near that point known as your to-wit 101 mile post from Richmond, the said Sam Joe Nixon was run down by the negligence of your agents and employees in charge of the locomotive drawing one of your extra freight trains going west, said freight train being known as to-wit No. 1008; the said negligence of your said agents and employees consisting in their failing to keep a constant lookout ahead for obstructions which said constant lookout for obstructions was a duty required of your said agents and employees, your said agents and employees being enginemen, and required by the rules of your railroad company to so keep a constant lookout, and the said Sam Joe Nixon being also a servant, was relying upon the faithful performance of said rules at the time of the infliction of the said negligent acts causing his death by reason of which said negligence the said Sam Joe Nixon was then and there killed, and the said Sam Joe Nixon being survived by a widow and children, to-wit: Annie Eliza Nixon (widow); Dorothy Nixon (child), age five; Mildred Nixon (child) age three; Mary Nixon (child) age three; Samuel Franklin Nixon (child) age fifteen months, and the said widow and children being deprived of their sole support by the death of the said Sam Joe Nixon, have suffered damages to the amount of Twenty-five Thousand Dollars ($25,000.00) by the said wrongful death at your hand of the *said* Sam Joe Nixon and I, [fol. 279] having been regularly appointed personal representative of the estate of the said Sam Joe Nixon, am entitled to recover the said damages from you for the benefit of the said widow and children, in accordance with the statute for such cases made and provided.

And for this also, to-wit:

(12) On the to-wit 21st day of June, 1921, you were a common carrier by railroad engaged in commerce between the State of Virginia and the State of West Virginia, that is to say, on the said 21st day of June, 1921, you were the owner of and operating a railroad passing from the State of Virginia to the State of West Virginia, and held yourself out to the public generally as one who undertook for hire or reward to transport goods and passengers from the State of Virginia to the State of West Virginia and did as a public employment transport goods and passengers by means of said railroad from the State of Virginia to the State of West Virginia; and on the said to-wit 21st day of June, 1921, one Sam Joe Nixon, who was the sole support of the hereinafter mentioned widow and children, was employed by you in said interstate commerce; that is to say, on the said day the said Sam Joe Nixon was your servant and as said servant was engaged in repairing your railroad tracks over which passed regularly your trains carrying goods and passengers from the State of Virginia to the State of West Virginia and while you were so engaged in said interstate commerce and while the said Sam Joe Nixon was so employed by you in said interstate commerce, the said Sam Joe Nixon was killed by the negligence of your agents and em-

ployees; that is to say, the said Sam Joe Nixon was in your employment as a section foreman and as said section foreman his duties required him to keep in repair that part of your railroad tracks running through Nelson County, Virginia, near to-wit Midway Mills and over which you as a public calling regularly carried goods and passengers for hire from the State of Virginia to the State of West Virginia, and as said section foreman you had furnished him a certain dwelling house to be used as a home near Midway Mills, which said dwelling house was situated a distance of to-wit one and one-half miles from his tool house at which said tool house the said Sam Joe Nixon regularly met his gang of fellow-servants for your company, and with them went to work each working day repairing tracks over which you as a common carrier by railroad hauled goods and passengers from the State of Virginia to the State of West Virginia, and on the morning of the said to-wit 21st day of June, 1921, the said Sam Joe Nixon left the said dwelling house and in the course of his employment with you, and with your knowledge, was travelling on your [fol. 280] railroad tracks on a railroad tricycle to his said tool house (the said tricycle having been furnished by you and he having been invited and permitted by you to use said tricycle on your tracks as a means of travelling from the said dwelling house to said tool house and the said Sam Joe Nixon being required by the rules of your railroad company to pass over this section of your track as often as practicable and to know that it was in a proper and safe condition) when at about the hour of 6:30 a. m. and at a place on your railroad in to-wit Nelson County, Virginia, near that point known as your to-wit 101 mile post from Richmond, the said Sam Joe Nixon was run down by the negligence of your agents and employees in charge of the locomotive drawing one of your extra freight trains going west, said freight train being known as to-wit No. 1008; the said negligence of your agents and employees consisting of this: at the time and place mentioned the said Sam Joe Nixon was travelling on a straight part of your railroad and it was then and there apparent from the attitude and manner of the said Sam Joe Nixon that he was unconscious of the approach of the said train and the danger therefrom, and the said Sam Joe Nixon could have been seen by your agents and employees in charge of said locomotive drawing said train for a distance of to-wit 800 yards and at a sufficient distance for the said agents and employees to have stopped the said train in time to have avoided injuring the said Sam Joe Nixon had your said agents and employees in charge of said locomotive drawing said train used ordinary care to keep a lookout to discover persons rightfully using your said tracks at the time and place mentioned, but your said agents and employees negligently failed to keep a lookout for the said Sam Joe Nixon, by reason of which said negligence the said Sam Joe Nixon was then and there killed, and the said Sam Joe Nixon being survived by a widow and children, to-wit, Annie Eliza Nixon (widow), Dorothy Nixon (child) age five, Mildred Nixon (child) age three, Mary Nixon (child) age three, Samuel Franklin Nixon (child) age fifteen months, and the said widow and

children being deprived of their sole support by the death of the said Sam Joe Nixon, have suffered damages to the amount of Twenty-five Thousand Dollars ($25,000.00) by the said wrongful death at your hands of the said Sam Joe Nixon and I, having been regularly appointed personal representative of the estate of the said Sam Joe Nixon, am entitled to recover the said damages from you for the benefit of the said widow and children, in accordance with the statute for such cases made and provided. Therefore, at the time and place [fol. 281] aforesaid, and before the aforesaid court, I shall move for judgment as aforesaid.

Annie Eliza Nixon, per Rep., by Counsel of Sam Joe Nixon, Deceased.

In Circuit Court of Nelson County

[Title omitted]

Order Continuing Cause

Both parties hereto consenting, by counsel, this cause is continued to the May Term, 1922.

In Circuit Court of Nelson County

[Title omitted]

Order Granting Leave to File Demurrer to Motion for Judgment—May 22, 1922

On motion of defendant by counsel, leave is given it to file its demurrer to the plaintiff's notice of motion, which is accordingly done.

[fol. 282] In Circuit Court of Nelson County

Demurrer to Motion for Judgment

[Title omitted]

And the defendant, by its attorneys, comes and says that the notice of motion and each count thereof are not sufficient in law, and assigns therefor the following grounds:

1. The notice alleges no duty owing by the defendant to the plaintiff's intestate, the breach of which constitutes actionable negligence.

2. It does not appear from the said notice of motion that the relationship of master and servant existed between the defendant and

the plaintiff's intestate at the time of the alleged injury, and consequently this suit cannot be maintained under the Employer's Liability Act, either State or Federal.

3. The notice shows on its face such contributory negligence as to bar any recovery on behalf of the plaintiff's intestate in the status of either a licensee or invitee.

4. The defendant did not owe the plaintiff's intestate any such duties as may be inferred from the statements contained in the said notice.

5. It does not appear from said notice that the plaintiff's intestate was engaged in either interstate or intrastate commerce at the time of his injury.

6. It appears from the notice of motion that plaintiff's intestate assumed the risk of injury from sources mentioned in said notice of motion.

The Chesapeake & Ohio Railway Company, by Counsel. Harrison & Long, p. d.

[fol. 283] IN CIRCUIT COURT OF NELSON COUNTY

[Title omitted]

ORDER OVERRULING MOTION FOR JUDGMENT—Oct. 5, 1922

This day came again the parties, by counsel, and the defendant's demurrer to the plaintiff's notice of motion for judgment, having been argued the Court doth overrule the same to which action and ruling of the Court, the defendant, by counsel, excepts.

Thereupon the defendant filed in writing its grounds of defence and its defence of Contributory negligence, and for plea says it is not guilty in manner and form as the plaintiff in her notice of motion hath complained and of this, it puts itself on the Country and the plaintiff doth likewise. Thereupon came a special jury, to-wit: W. C. Crank, J. T. Stevens, Jr., O. O. Atto, R. L. Camden, E. G. Baker, T. M. Browning, S. F. Stevens, John W. Goodwin, Sterling T. Harris, W. D. King, Harry Spencer, J. H. Bibb, summoned and empanelled as the law directs, who were sworn to well and truly try the issues joined and a true verdict render according to the law and the evidence, and having partly heard the evidence were adjourned until tomorrow morning at 9:00 o'clock.

In Circuit Court of Nelson County

[Title omitted]

Statement by Defendant of Points to be Relied Upon

The defendant in this case will rely upon the following grounds of defense:

1. That the plaintiff's intestate was not in the employ of the defendant company at the time of the alleged injury, and consequently was not engaged in either interstate or intrastate commerce, nor was he engaged in the performance of any act in furtherance of the master's business or within the scope of his employment.

2. That the defendant was not guilty of the negligent acts or omission alleged in the various counts of the notice of motion or any of them, to have been the proximate cause of the death of [fol. 284] said intestate, nor was the death of said intestate proximately caused by any negligent act or omission on the part of this defendant.

3. That the plaintiff's intestate was guilty of such contributory negligence as to bar his recovery, and that his death was caused solely by his own negligence.

4. That the plaintiff's intestate, if an employee of this defendant and at the time of the accident complained of actually engaged in interstate commerce, had assumed the risk of being struck by the trains being operated by the defendant.

5. That the said defendant did not owe to the said intestate any such duty as is alleged in the said notice of motion or any count thereof.

In the Circuit Court of Nelson County

The Chesapeake & Ohio Railway Company

ads.

S. J. Nixon's Adm'x

Defense of Contributory Negligence

The defendant in this suit intends to rely as a defense upon the contributory negligence of the plaintiff's intestate as a defense to this action or in mitigation of damages, as the case may be, depending upon the status of the said intestate, the said negligence of the plaintiff's intestate consisting of this, to-wit:

That heretofore, to-wit, on the 21st day of June, 1921, the said intestate, while traveling for his own convenience over the tracks of

the defendant company, where he well knew trains were run at any and all times, and in either direction, at a high rate of speed, failed to keep the necessary lookout for his own safety or to watch for the approach of said trains, or to make use of his senses of sight and hearing, as a result of which failure, without any fault on the part of the said defendant, the said intestate received the injuries complained of.

That heretofore, to-wit, on June 21, 1922, the said intestate, instead of walking from his home to his work, along the County road or otherwise, chose to use, for his own convenience, a certain railroad tricycle, called a velocipede, and to run the same over the rails and track of the said defendant, and while so using the said velocipede the said intestate was killed; and in so using the said velocipede, the said intestate knowingly exposed himself to the danger of [fol. 285] injury from collision with the trains of the said defendant company, lawfully using said tracks, which said intestate might have avoided by using some other means of going to and from his work; which said acts of said intestate constituted negligence proximately and solely causing the injuries herein complained of.

IN CIRCUIT COURT OF NELSON COUNTY

[Title omitted]

ORDER CONTINUING CAUSE—Oct. 6, 1922

This day came again the parties by their attorneys and the same jury as was sworn on yesterday in this cause and having fully heard the evidence, were adjourned until tomorrow morning at 10:00 o'clock.

IN CIRCUIT COURT OF NELSON COUNTY

[Title omitted]

VERDICT—Oct. 7, 1922

This day came again the parties by their attorneys and the same jury as was sworn on Thursday last in this cause, and having heard the instructions of the Court and argument of counsel, the jury retired to their room to consider of their verdict, and after some time spent therein, returned into Court and rendered the following verdict, to-wit: "We the jury find for the plaintiff in the sum of $10,000.00 to be used by the plaintiff for the benefit of herself and four orphan children." (Signed) R. L. Camden, Foreman.

Thereupon the defendant, by counsel, moved the Court to set aside the verdict as contrary to the law and the evidence and without evidence to sustain it, and grant it a new trial, which motion is set down for argument.

[fol. 286] IN CIRCUIT COURT OF NELSON COUNTY

[Title omitted]

ORDER GRANTING MOTION TO SET ASIDE VERDICT AND FOR A NEW TRIAL—Feb. 10, 1923

This day came again the parties by their attorneys, and the Court having heard the argument of counsel upon the motion of the defendant to set aside the verdict of the jury rendered at the September Term, 1922, of this Court, as contrary to the law and the evidence and without evidence to support it, and to grant it a new trial, doth sustain said motion and doth set aside said verdict and doth award to the parties a new trial thereof.

[Title omitted]

MINUTE ENTRY—June 7, 1923

This day came again the parties by their counsel, and thereupon came a special jury to-wit: T. B. Anderson, A. A. Burks, J. C. Clarkson, H. C. Jones, A. A. Loving, J. E. Purvis, A. G. Stevens, W. P. Thacker, V. C. Wood, Charles H. Campbell, S. E. Saunders, and E. L. Turpin summoned and *empannelled* as the law directs, who were sworn to well and truly try the issue joined and a true verdict render according to the law and the evidence, and having partly heard the evidence were adjourned until tomorrow morning at 9:30 o'clock.

[fol. 287] [Title omitted.]

MINUTE ENTRY—June 8, 1923

This day came again the parties by their counsel and the same jury as was sworn on yesterday in this cause, and having fully heard the evidence were adjourned until tomorrow at 9:00 a. m.

IN CIRCUIT COURT OF NELSON COUNTY

[Title omitted]

VERDICT—June 9, 1923

This day came again the parties by their attorneys, and the Jury sworn to try this case, and having heard the instructions of the Court and argument of counsel, the jury retired to their room to consider

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of their verdict, and after some time spent therein returned into Court and returned the following verdict, to-wit:

"We the jury find for the plaintiff in the sum of $12,000.00, one-third for the widow and two-thirds for the four orphan children. (Signed) S. E. Saunders, Foreman."

ORDER OVERRULING MOTION TO SET ASIDE VERDICT

Thereupon defendant, by counsel moved the Court to aside the verdict as contrary to the law and the evidence and to enter judgment for the defendant, which motion the Court doth overrule. To which action of the Court defendant excepted. Therefore it is considered by the Court that the plaintiff do recover of the defendant the sum of Twelve Thousand Dollars ($12,000.00) one-third of which is for the widow Annie E. Nixon and two-thirds for the four orphan children, the amount by the jury in their verdict ascertained, and her costs in this behalf expended.

And the defendant intimating a purpose of applying to the Supreme Court of Appeals for a writ of error to this judgment, it is ordered that the execution of the same be suspended for a period of ninety days from this date upon the said defendant entering into a proper suspending bond before the Clerk of this Court in a penalty [fol. 288] of $200.00 with surety to be approved by said Clerk and conditioned according to law.

IN CIRCUIT COURT OF NELSON COUNTY

CLERK'S CERTIFICATE

I, C. W. Embrey, Clerk of the Circuit Court of Nelson County in the State of Virginia, do certify that the foregoing is a true transcript of the record of said Court, in the suit of Mrs. Annie Nixon, Admx., plaintiff, vs. Chesapeake & Ohio Railway Co., defendant; and further that it appears from the records in said suit, that said Chesapeake & Ohio Railway Co., by counsel, has given notice to said Mrs. Annie Nixon, Admx., of its intention to apply for this transcript, as required by law.

Given under my hand this 12th day of July, 1923.

C. W. Embrey, Clerk.

The fee of the Clerk of the Circuit Court of Nelson County for making the foregoing transcript is $134.45.

A copy, Teste:

H. H. Wayt, Clerk.

(Here follows map marked side folio page 289.)

[fol. 290] IN SUPREME COURT OF APPEALS

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, Plaintiff in Error,

vs.

ANNIE NIXON, Admx. of Sam Joe Nixon, Dec'd, Defendant in Error

Upon a Writ of Error and Supersedeas to a Judgment of the Circuit Court of Nelson County Pronounced on the 9th day of June, 1923

ORDER CONTINUING CAUSE—Sept. 16, 1924

This cause was this day partly heard upon the transcript of the record of the judgment aforesaid and arguments of counsel, and continued until tomorrow morning for a further hearing.

A copy: Teste: H. H. Wayt, Clerk.

[fol. 291] IN SUPREME COURT OF APPEALS

[Title omitted]

ARGUMENT AND SUBMISSION—Sept. 17, 1924

This cause was this day fully heard upon the transcript of the record of the judgment aforesaid and arguments of counsel, but because the Court here is not yet advised of the order to be entered in the premises, time is taken to consider thereof.

A copy: Teste: H. H. Wayt, Clerk.

[fol. 292] IN SUPREME COURT OF APPEALS OF VIRGINIA

OPINION—November 13, 1924

Judge FREDERICK W. SIMS, President:

In this action there was a verdict and judgment for $12,000, recovered as a liability under the Federal Employers' Liability Act, against the plaintiff in error, the Chesapeake and Ohio Railway Company (hereinafter called the defendant company, or company), in favor of Annie Nixon, administratrix of Sam Joe Nixon, deceased, (who will be hereinafter referred to as plaintiff and the decedent, respectively), for the death of said decedent, alleged to have been occasioned by the negligence of the defendant company, in that the engineman and fireman, (the employees of the latter operating a train which ran down and killed the decedent), failed to keep a

reasonable lookout for the decedent just before he was killed, when he was upon the track going over it in a velocipede as a licensee, under the express permission of the defendant company, and when he was also engaged in the discharge of a duty incumbent upon him as an employee of the defendant company, of inspecting the track, (over which the defendant company was, at the time, engaged in interstate commerce), to see if it was in a proper and safe condition.

[fol. 293] The circumstances under which the decedent was killed, as shown by the uncontroverted evidence, were as follows:

The decedent was at the time he was killed, and had been for a number of years, a section foreman, his regular hours of employment on his section of the railroad being from 7 a. m. to 4 p. m. daily. For about a year next preceding his death he lived with his family in a house by the side of the railroad track, on the north side of and opposite a curve in the track. The track, as it approached the point opposite this house, from east to west, came through a cut several hundred feet east of the house, on a curve which bent to the left, as it extended westward, until it reached a point 575 feet west of the point opposite the house, thence extended a distance of 1,377 feet in a straight line to a point beyond where the decedent was struck on the track by an extra freight train, consisting of engine, tender and ten gondola coal cars, and was killed, on a clear June day, at 6:35 o'clock in the morning. From thence the track extended on westward, practically straight, for a distance of nearly a mile. The section on which the decedent was foreman extended from a point east of his house to Midway, a point about 1¼ miles west of his home. The decedent and his force of men began their regular [fol. 294] hours of work each morning at Midway, where the tool-house was located, at 7 a. m., and ended such hours of work at the same place each afternoon at 4 o'clock. It was the daily custom of the decedent, foreman, and his men to meet at the tool-house from 7 to 20 minutes before 7 o'clock, so as to be ready to set out from the tool-house promptly at that hour. Prior to the beginning of his occupancy of the aforesaid dwelling house, the decedent asked and obtained the express permission of the Supervisor of track of the defendant company, his superior officer in charge of section foreman of the defendant company on that part of the system of the latter, to make use of a certain velocipede, after he moved into said house, in going to and from the tool-house at Midway. The velocipede was a three-wheeled vehicle, made to run over a railroad track, propelled by foot pedals, with a seat for the person using it, located directly over the right-hand rail of the track, geared so that it could travel only at a speed of about 9 or 10 miles an hour, a slow enough speed for the person operating it to have time to inspect the track closely in going over it for any defects which might exist in it needing repair. And one of the rules of the defendant company, which the evidence tended to show, was, among others, faithfully observed by the decedent, imposed the duty upon the decedent, whenever he was [fol. 295] going over the track, whether in or out of his regular hours of employment, to inspect the track for the purpose aforesaid.

The decedent was seen by the plaintiff, his wife, to go down to

the railroad track opposite his home, there put the velocipede on the track, take his seat, and set out thereon for Midway at 6:30 a. m. of the day he was killed, which the evidence tended to show was about his usual time for setting out for Midway each morning. After he had gone some distance he was seen by her to look back just before the train could be seen by him, and thereafter to go on his way, pedalling the velocipede along the track. Just at this moment she saw the train come around the curve above mentioned, dash by the front of the house and on behind the decedent, who was then seen by the wife with his face continuously turned forward, not again looking back while he was in her sight; and he was in her sight until the train interposed itself between her and him as he was proceeding on the track. The train must have overtaken him in a few seconds, as we must conclude from the speed of the train and the place where the body was found,—such speed being about 25 miles an hour, as estimated by the defendant's witnesses, and a greater speed is estimated by witnesses for the plaintiff. The body was found [fol. 296] 1,952 feet west of the point opposite the dwelling house and lying on the north and right hand side of the track, about 9 feet therefrom, on the side of the railway embankment. The head was crushed at the back; the velocipede was broken and scattered into small fragments, some of which were found at different places along the track; the watch of decedent had stopped at 6:35 o'clock. No signal of any kind was given by the train—after the engineman, if he had been on his seat, the fireman, had he looked, could have seen decedent and the position he was in in ample time for warning blasts of the whistle to have been given, and the train stopped, if the warning had not been heeded, as it was shown in evidence and uncontroverted that the train could have been brought to a standstill in 500 feet. The train went on, without stopping, until it reached the terminal of the run of its crew, which was at Gladstone, a few miles away. Neither the engineman nor the fireman were looking out at the time, and no one on the train saw the accident, or knew that anything had been struck until the train reached Gladstone.

There was conflict in the evidence as to whether any wind was blowing at the time, which prevented the decedent from hearing a road crossing blast of the whistle, which was given just before the train came opposite the said dwelling, and from hearing the noise [fol. 297] of the train itself as it approached him. There was the testimony of several witnesses for the plaintiff, however, to the effect that there was a very strong wind at the time, blowing directly eastward, which carried the noise of said whistle blowing and of the moving train away from the decedent; so that it was a reasonable inference that he did not hear it until it was upon him and struck him.

The engineman and fireman both testified as witnesses for the defendant company and both admitted that they were not keeping any lookout ahead from the time they would have seen the perilous position of the decedent until after they had gone past the place at which he was killed.

The reason the engineman gave for his keeping no lookout at the time just before the train turned the aforesaid curve and came upon the straight track of 1,377 feet and the further stretch of comparatively straight track west of that,—altogether a mile or more of practically straight track,—is that he stood up on his seat to examine the lubricator and to adjust it, if it needed adjustment, which occupied him until the train had gone past the place where the decedent's body was afterwards found. He testified that this was a duty which he had to perform at some time as he neared the end of the train's run, which was Gladstone on this occasion; but that there was no [fol. 298] particular need for him to have done this at the particular time he did—that the same result would have been attained had he done it a short while afterwards, after he had reached the home of the decedent and the aforesaid stretch of track, extending therefrom towards Midway; or a short while before he reached the home of the decedent and the aforesaid stretch of track. He testified further that he knew the decedent well; knew that he was section foreman on that section, knew the location of his home and that he had to go from his home to his place of work; but claimed that he did not know at the time whether the decedent's regular hours of work began at 7 or 7:30 a. m.; that he did not know that the decedent used a velocipede in going to and from his work; that he knew that there was a path alongside the railway from decedent's home to his beginning place of work at Midway, and that he expected the decedent would have been in such path at the time the train was passing over this locality if he was then on his way to work; and further to the effect that he had no idea that he owed any duty to keep a lookout for the decedent being on the track at the time, otherwise he would not have taken the time he did to attend to the lubricator.

The testimony of the fireman was to the effect that he saw the engineman when he stood on his seat for the aforesaid purpose, and [fol. 299] that he knew the engineman was not then keeping a lookout; yet that he, the fireman, did not thereupon keep a lookout; and knew that no one was keeping a lookout while the engineman was so engaged. The fireman's testimony on this subject is, in substance, that he was on his seat, from which he could have looked out of the side window and seen the decedent ahead a farther distance away, as they approached him, than the engineman could have seen him, owing to the curve of the track being in the fireman's favor and not away from his line of vision; that he may have been engaged himself in the performance of some duty, but he did not undertake to say whether he was so engaged or not; and the fact made prominent by his testimony is that he had no idea that he owed any duty of keeping a lookout for the decedent being on the track at the time; otherwise, as may be reasonably inferred from his testimony, he could have spared the time from his other duties to and would have done so.

There was testimony by the plaintiff to the effect that, as the train dashed by her, as aforesaid, she saw the engineman and fireman on the deck between the engine cab and the tender, laughing and

talking, which it is claimed on the part of the defendant company is incredible, because of certain physical facts shown in evidence. [fol. 300] In view of the testimony of the engineman and fireman, and of the opinion thereon expressed below, further reference to the testimony on this subject is omitted as upon an immaterial issue [illegible].

There was also testimony of the plaintiff to the effect that while she could not see the decedent when he was struck on the track of the train, she did see him as he was thrown from the track; which, likewise, it is claimed in behalf of the defendant company is incredible, because of certain physical facts in evidence. Reference to this evidence in detail is also omitted as immaterial, in view of the consideration that the other evidence on the subject, above mentioned, was amole to warrant the jury in finding that the decedent was killed under the circumstances thereby disclosed as above set out.

There was testimony for the defendant company to the effect that the decedent was accustomed, prior to the accident, to take with him to Midway, when he went there each morning, bran to give his cow, (which was in a pasture there adjacent to the tool-house), while milking her; and that he was accustomed to milk this cow, sometimes in the morning after getting to Midway, between his arrival and his going to work for the defendant company at 7 o'clock, and sometimes in the evening after his regular hours of work for the company were over. The plaintiff in her testimony stated positively that [fol. 301] the cow was not being milked by anyone during a certain period which covered the time of the accident. It is claimed, however, on the part of the defendant company, for reasons which need not be mentioned, that this testimony of the plaintiff is likewise incredible. But since the cow-milking, if it was accustomed to be done by the accused, as stated in the testimony for the defendant company, is relied on merely to support the position that the accused, when killed, was on his way to milk the cow—a business of his own—so that he was not then engaged about his master's business, showing that the relationship of master and servant did not then exist between him and the company; and since the evidence is uncontroverted as above stated, from which the inference is to be drawn that the decedent, while on his way to Midway and when killed, was engaged in inspecting the track, a duty imposed upon him as incident to his employment; so that he was then unquestionably about his master's business; detailed reference to the testimony, pro and con, on the subject of the cow-milking is also omitted as immaterial.

Sims, P., after making the foregoing statement, delivered the following opinion of the court:

The questions presented by the assignments of error will, so far as necessary for the decision of the case, be disposed of in their order as stated below.

[fol. 302] The chief question thus presented, in various ways,—(by the assignments that the trial court erred in overruling the motion to set aside the verdict, and in the giving and refusing of instructions)—is the following:

1. Did the defendant company owe to the decedent the duty of having its enginemen and fireman keep, while not prevented from so doing by necessary attention, in the exercise of reasonable care, to their other duties, a reasonable lookout ahead for his being on the track in front of the train which killed him on the velocipede he was then using, while traversing, at his usual time in the morning for so doing, that portion of the track which was between his home and Midway, under the express permission given him by the company to so use such track?

The question must be answered in the affirmative.

It appears from the evidence that the decedent had the express permission of the defendant to so traverse the portion of the track mentioned at such time. He was, therefore, undoubtedly a licensee at the time, and, under the settled rule on the subject in this jurisdiction, the defendant company owed him the duty of having its engineman and fireman, on the train which killed him, while not prevented from so doing by necessary attention, in the exercise of [fol. 303] reasonable care, to their other duties, keep a reasonable lookout ahead for his being on the track in front of the train while it was going over the portion of the track in question.

That such is the settled rule, certainly in this jurisdiction, if the decedent was a licensee, is not controverted in argument before us. Several positions are, indeed, taken in argument in behalf of the defendant company, to the effect that the duty in question, on the part of the defendant, did not exist in the instant case; but as these positions are all based on the assumption of fact that the deceased was not a licensee, it is unnecessary for us to deal with them, or with the authorities cited to sustain such positions.

The following subsidiary questions are also presented by the assignments of error:

2. Did the necessary attention, in the exercise of reasonable care, to their other duties, prevent the engineman from keeping the reasonable lookout ahead above mentioned? And was the failure to keep such lookout the proximate cause of the death of the decedent?

The first branch of the question must be answered in the negative, and the second in the affirmative.

Laying aside the consideration of any other evidence on this sub-[fol. 304] ject, other than the testimony of the engineman and fireman, we see that it affirmatively appears from that testimony that there was no necessary attention at the time to any other duty which prevented the engineman from keeping a lookout ahead for the decedent being on the track in front of the train. According to this very evidence, the engineman could have given the necessary attention to the lubricator, about which he was engaged at the time, equally as well at some other time, which would not have interfered

with his keeping the aforesaid lookout. And according to this very testimony too, the real reason why the engineman did not keep such lookout at the time was that he had not been informed and did not consider that it was his duty to keep any lookout for the decedent. Having given the decedent the express permission aforesaid to use the track as he was doing, it was the duty of the defendant company to have had the engineman instructed that it was his duty to keep the aforesaid reasonable lookout for the decedent. Hence, the ignorance of the engineman on the subject aforesaid furnished no defence to the defendant in the premises. And, since it is apparent from the circumstances shown in evidence that had such lookout been kept, the perilous position of the decedent just before he was killed, and his obvious unconsciousness theerof, would have been discovered and the accident, by the exer- [fol. 305] cise of reasonable care on the part of the engineman, could have been prevented, it is also apparent that the failure to keep such lookout was the proximate cause of the death of the decedent.

3. Was the decedent engaged in interstate commerce at the time he was killed?

The question must be answered in the affirmative.

The positions taken in behalf of the defendant company, and the authorities cited in support thereof, do not controvert the fact that the track was being used by the defendant company in the transportation of interstate commerce; nor the correctness of the conclusion that the decedent was engaged in interstate commerce at the time he was killed, if he was then engaged in discharging a duty incident to his employment, of inspecting the track. That the latter was a fact is a reasonable inference from the uncontroverted evidence, and, hence, in view of the verdict of the jury, must be regarded by us as an established fact in the case. That being so, any discussion of the aforesaid positions, or of the authorities cited in support thereof, would be irrelevant, and therefore will not be entered upon.

4. Are the cases of Southern Railway Co. v. Hall, 102 Va. 137, and Same v. Adams, 129 Va. 233, controlling authority to the effect that there can be no recovery against the defendant company in the [fol. 306] instant case, for the reason that there is such an absence of evidence as to the situation at the time the decedent was killed as to leave it a mere matter of speculation and surmise as to whether the death was caused by the negligence of the defendant, or solely by the contributory negligence of the decedent?

The question must be answered in the negative.

It is true that in the instant case, as in the cases in question, there was no eyewitness of the accident itself. But there the similarity between the cases ends. In the instant case the circumstances, shown by the uncontroverted evidence, put before the jury the whole situation shortly preceding and practically almost up to the very instant

of the accident; thus furnishing evidence from which the situation at that very instant might be inferred by the jury with all of the certainty that would be required even in a criminal case. And that situation, as so inferred, presents a case, in which, for the reasons above stated, the death of the decedent appears to have been proximately caused by the failure of the defendant company to discharge [fol. 307] the duty incumbent on it, as above held, of having its engineman and fireman keep a reasonable lookout ahead for the decedent being on the track.

The case will have to be affirmed.

A copy. Teste: H. Stewart Jones, C. C.
A copy. Teste: H. H. Wayt, Clerk.

[fol. 308] IN SUPREME COURT OF APPEALS OF VIRGINIA

[Title omitted]

JUDGMENT—NOV. 13, 1924

This cause, which is pending in this Court at its place of session at Staunton, having been fully heard but not determined at said place of session; this day came here the parties by counsel, and the Court having maturely considered the transcript of the record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the judgment complained of. It is therefore considered that the same be affirmed, and that the plaintiff in error pay to the defendant in error damages according to law, and also her costs by her expended about her defence herein.

Which is ordered to be entered in the order book here and forthwith certified, together with a certified copy of the opinion in this cause, to the Clerk of this Court at Staunton, who will enter this order in the order book there and certify it to the said Circuit Court.

A Copy, Teste: H. Stewart Jones, C. C.
A Copy, Teste: H. H. Wayt, Clerk.

[fols. 309 & 310] IN SUPREME COURT OF APPEALS OF VIRGINIA

[Title omitted]

SUBMISSION OF CAUSE ON PETITION FOR REHEARING—Jan. 6, 1925

This day came the plaintiff in error, by counsel, and moved the court to set aside the judgment entered herein on the 13th day of November, 1924, and grant a rehearing; but, because the court here

is not yet advised of its judgment to be given in the premises, time is taken to *considered* thereof.

A Copy. Teste:

H. Stewart Jones, C. C.

[fol. 311] In Supreme Court of Appeals of Virginia

[Title omitted]

Petition for Rehearing

To the Honorable Judges of the Supreme Court of Appeals:

The Chesapeake and Ohio Railway Company respectfully petitions this honorable court for a re-hearing of the above case, decided November 13th, 1924.

The jury awarded the plaintiff the sum of $12,000.00, which the opinion shows was "recovered as a liability under the Federal Employers' Liability Act" as damages for the death of her intestate; hence the Federal Employers' Liability Act controls the case, and the Federal decisions construing this act are binding on the state courts.

"In construing the Federal Employers' Liability Act the decisions of the national courts control over those of the state courts."
Roberts' Federal Liabilities of Carriers, Vol. 1, Sec. 426.

[fol. 312] The Federal Employers' Liability Act gives a right of action only to an employe engaged in interstate commerce at the time of the injury complained of. The verdict of the jury being for an amount permissible only under the Federal act, precludes all consideration of the rights of a licensee, and must be sustained, if at all, on the status of the decedent as an employe. The primary question for consideration, therefore, is whether the decedent was an employe engaged in interstate commerce at the time of the injury complained of.

The Court, however, held this question to be "subsidiary," and rested its decision on the ground that the decedent was a licensee, and as such entitled to a lookout.

In the opening paragraph of the statement of facts preceding the opinion it is said that the decedent was going over the defendant's track "as a licensee under the express permission of the defendant company." After completing the statement of facts the court states the question of law to be decided as follows:

"The chief question thus presented in various ways * * * is the following:

1. Did the defendant company owe to the decedent the duty of having its engineman and fireman, while not prevented from doing

by necessary attention, in the exercise of reasonable care, to their other duties, keep a reasonable lookout ahead for his being on the track in front of the train which killed him on the velocipede he was then using, while traversing, at his usual time in the morning for so doing, that portion of the track which was between his home and Midway, under the express permission given him by the company to use such track."

This question, which the court considers the chief question in the case, is answered as follows (italics supplied):

"The question must be answered in the affirmative.

It appears from the evidence that the decedent had the express [fol. 313] permission of the defendant to so traverse the portion of the track mentioned at such time. He was, therefore, undoubtedly a licensee at the time, and, under the settled rule on the subject in this jurisdiction, the defendant company owed him the duty of having its engineman and fireman on the train which killed him, while not prevented from so doing by necessary attention, in the exercise of reasonable care, to their duties, keep a reasonable lookout ahead for his being on the track in front of the train while it was going over the portion of track in question.

That such is the settled rule, certainly in this jurisdiction, if the decedent was a licensee, is not controverted in argument before us. Several positions are, indeed, taken in argument on behalf of the defendant company, to the effect that the duty in question did not exist in the instant case; but as these positions are all based on the assumption of fact that the deceased was not a licensee, it is unnecessary for us to deal with them, or with the authorities cited to sustain such positions. * * *

Having given the decedent the express permission aforesaid to use the track as he was doing, it was the duty of the defendant company to have had the engineman instructed that it was his duty to keep the aforesaid reasonable lookout for the decedent."

The court concludes that the defendant company owed the decedent the duty of having the engineman keep a lookout for him—not because the decedent was an employe engaged in interstate commerce—but because he was a licensee under the express permission of the company to use the velocipede over the track.

The court, therefore, sustained the recovery on the ground that the decedent was a licensee, towards whom the defendant failed to discharge its duty of maintaining a lookout.

We submit, with great deference, that the court erred in holding that the liability in this case can be sustained on the ground that the decedent was a licensee. As already pointed out, the Federal Em- [fol. 314] ployers' Liability Act confers no rights or benefits on a licensee, and all questions affecting the rights of a licensee are irrelevant. The Federal Act provides but one status for the decedent at the time of his injury, namely, an employe engaged in interstate commerce, and unless the decedent comes within the terms of the Act the verdict cannot be sustained.

It is true the court held that the decedent was engaged in interstate commerce at the time he was killed, but this was said to be a "subsidiary question," and the finding was based upon the theory that the decedent was "inspecting the track."

It is respectfully submitted that there is no evidence in the case that the decedent, at the time of the accident, was "inspecting the track" or that he started out on an inspection tour. On the contrary, the testimony of the decedent's wife, the plaintiff in the suit, was that he "used the velocipede to go to and from his work," and that on the morning of the accident he started to go to the tool house to begin his day's work.

The case was tried upon that theory, and it was sought to establish the decedent's status as an employe on the ground that his employment had begun when he started to the tool house.

But two witnesses testified in relation to the decedent's duties of inspection. The first was the plaintiff, who answered the following leading question:

"Q. Do you know anything with respect to your husband's duties, whether it was his business to look after the track all the time, not only during working hours, but all the time?

A. Yes, sir, it was his duty." (Record, page 39.)

Obviously the decedent was not subject to any rule of the company, and was under no contractual duty to the company "out of his regular hours of employment." He could not, of course, enter upon a tour of inspection at the defendant's risk except in pursuance of his contract of employment.

[fol. 315] "The relation of master and servant, so far as the obligation to protect the employe is concerned, begins when the employe is necessarily on the premises of the master pursuant to his contract of employment."

Roberts' Federal Liabilities of Carriers, Vol. 1, page 788, and cases cited.

The only intelligible construction, therefore, that can be put upon the foregoing answer is that she meant that if her husband, when on the track on his own business or pleasure, chanced to observe any defect, he would take such steps as were necessary to prevent accidents to trains. Any man actuated by a humanitarian spirit would do the same thing. This explanation is confirmed by the cross examination of V. L. Douglas, who was the officer of the company immediately superior to the decedent:

"Q. Now it was Mr. Nixon's duty under the rules of the company to pass over the track as often as practicable, wasn't it?

A. For an inspection?

Q. If Mr. Nixon had discovered an obstruction, or defect of some kind on the track on that particular morning when he was killed, it would have been his duty to have stopped and attended to it immediately, wouldn't it?

A. As an employe, of course he would.

Q. So that he was really in the employ of the company at the time?

A. He wasn't on duty.

Q. But he was passing over the company's premises by express permission, and you, as his superior, say that if he had found any defects it would have been his duty to have stopped right then and done what he could to remedy it, and stop any train that was coming?

A. Any employe would do that, of course, whether on duty or not.

Q. I am not interested in any employe; I am interested in Sam Joe Nixon. It would have been his duty to stop right there and [fol. 316] remedy the defects, or to warn trains that might have been hurt by the defects?

A. Certainly it was." (Record, page 221.)

The foregoing testimony, relied upon to support the theory that the decedent was engaged in "inspecting the track" at the time of the accident, proves nothing more than that the decedent, as well as any other employe, was expected, if he discovered a defect while on the defendant's premises, to correct it, although he might not be on duty at the time. Any duty that he owed outside of his contractual duties was a mere moral obligation to look after the interests of the defendant company.

No question arises in this case as to the liability of the defendant if the decedent, at the time of the accident, was attempting to remedy a defect. On the contrary, the theory of the plaintiff was that he was struck while riding the velocipede, and the court so found.

In the case at bar the decedent admittedly got upon the track half an hour before his hours of service began, and unless it can be said that he was necessarily there pursuant to his contract of employment, the defendant would not be liable.

According to the testimony of the plaintiff he started at 6:30 o'clock in the morning, "as was his custom," to go to the tool house to join the gang of section men, of which he was foreman, and begin the day's work, and the theory of the plaintiff was that his employment began when he started to the tool house. But the overwhelming evidence shows that while he was going to the point where his employment was to begin, his immediate purpose was to feed and milk his cow, which he kept in a pasture near the tool house, and the contention of the defendant is that being on his way to do his own work he was not, for such length of time as he was so engaged before he was to commence his "regular hours" of employment, engaged in interstate commerce, nor was he necessarily on the premises of the defendant pursuant to his contract of employment.

[fol. 317] This court having based its decision upon the ground that the decedent was a licensee, disregarded this defense as immaterial, but if, as we contend, the recovery cannot be sustained on that ground, this defense has a material bearing on the question whether the deceased was, at the time of the accident, engaged in any duty connected with interstate commerce.

But, assuming that the status of the decedent as an employe is established, we are brought to a consideration of the additional and vital defenses relied upon, namely, that the defendant company

owed the deceased, a track employe, no duty of lookout, and that the deceased assumed the risks of injury by passing trains operated without a lookout for him. This court having sustained the recovery on the ground that the deceased was a licensee, found it unnecessary to pass upon these defenses, saying,

"Any discussion of the aforesaid positions, or the authorities cited in support thereof, would be irrelevant, and therefore will not be entered upon."

If we are correct in our view that this verdict can only be sustained on the ground that the deceased was an employe engaged in interstate commerce, these defenses become material, and must be passed upon in determining the liability of the defendant.

It is settled by the overwhelming weight of authorities that a railroad company owes track men engaged in work upon the tracks no duty of warning or lookout, and that the risks of injury from passing trains are assumed by them. "This rule," said the United States Circuit Court of Appeals,

"has the uniform support of the federal courts, both lower and appellate, as well as the state courts in all sections of the country."

Connelly v. Penn Ry. 201 Fed., 54, 119 C. C. A., 392.

[fol. 318] This question was fully discussed, and the authorities sustaining this position, cited, in the petition for writ of error, pages 22 et seq., to which we refer. The leading federal case is Aerkfetz v. Humphries, etc., Receivers, 149 U. S., 418, 36 L. Ed., 758, which was cited and relied upon in the Connelly case, supra.

In the Aerkfetz-Humphries case the plaintiff, Aerkfetz, was in the employ of the defendants in the yard of the railway company, working on one of the tracks therein, and while so engaged was run over and injured by a freight car moved by a switch engine. The plaintiff was perfectly familiar with the premises, and the continuous shifting of cars and trains. Mr. Justice Brewer, who delivered the opinion of the court, said:

"As an employe of long experience in that yard he was familiar with the moving of cars backward and forward by the switch engines. * * * He knew that the switch engine was busy moving cars and making up trains, and that at any minute cars were likely to be moved along the track upon which he was working. * * * There could have been no thought or expectation on the part of the engineman, or of any other employe that he, thus at work in a place of danger, would pay no attention to his own safety. Under such circumstances, what negligence can be attributed to the parties in control of the train, or the management of the yard. They could not have moved the cars at any slower rate of speed. They were not bound to assume that any employe familiar with the manner of doing business would be wholly indifferent to the going and coming of the cars. There were no strangers whose presence was to be guarded against. The ringing of bells and the sounding of whistles on trains going and coming, and switch engines moving forward

and backward would have simply tended to confusion. The person in direct charge had a right to act on the belief that the various employes in the yard familiar with the continuously recurring movement of the cars, would take reasonable precaution against their approach."

[fol. 319] The principle was again stated by the Supreme Court of the United States in Northern Pacific Railway v. Hambly, 154 U. S., 484, 38 L Ed., 1009, as follows:

"As a laborer upon a railroad track, either in switching trains or repairing the track is constantly exposed to the danger of passing trains, and bound to look out for them, and negligence in the management of such train is a risk which may, or should be contemplated by him in entering upon the service of the company. This is probably the most satisfactory test of liability."

The Connelly case, supra, briefed at length on page 24 of the petition, was taken to the Supreme Court of the United States and, pursuant to a stipulation filed there confessing error, the case was remanded for a new trial. See memorandum decision, 231 U. S., 764, 58 L. Ed., 472. Upon re-trial in the District Court a verdict was directed for the defendant company, and a writ of error to the Circuit Court of Appeals was obtained and the case came again before that court. That court again, on December 9, 1915, affirmed the judgment, contenting itself with a quotation from its former opinion. 228 Fed., 322, 142 C. C. A., 614. We have been unable to find an appeal from this decision to the United States Supreme Court, and feel safe in saying that no application for a writ of certiorari was made, or if made was refused.

In the Connelly case, which is an able discussion of the question, and in which numerous authorities, federal and state, are cited, the court said:

"In thus making self-protection the substantial safe-guard of track walkers and section men the law is reasonable and just, for no other dependable safe-guard can be afforded their perilous work in the practical operation of trains."

[fol. 320] The rule is thus stated in Elliott on Railroads, Vol. 4, Sec. 1862:

"Ordinarily section men or track men assume the risks incident to the running of trains, whether extra trains or trains running on schedule. Section employes are bound to know that the regular trains may be delayed and pass at uncertain intervals, and that wild or extra trains may be sent over the road, and they assume the risks of danger therefrom."

This rule has the unanimous approval of the Special Court of Appeals of Virginia in a decision rendered December 18, 1924, in the case of Davis, Director General, &c. v. Powell.

This case arose under the Federal Employers' Liability Act, and defense was made on the ground of assumed risk. In an able opinion rendered by Judge Chichester the court reached the conclusion that the plaintiff, a section laborer, assumed the risk, not only of trains approaching him without warning, but also of the negligent operation of the motor car upon which he was riding at the time.

In the nature of things this must be true. Track men are employed to keep the track in repair for the safe movement of trains. Transportation cannot be suspended while repair work is going on. "It is apparent," said Judge Chichester,

"that the work of repairing, and reaching the points where repairs are to be made, must be accomplished between the running of trains, and those engaged in this kind of work know this."

The work is necessarily hazardous, and requires constant vigilance on the part of those engaged in it, to avoid the danger of passing trains.

"When, therefore, a man contracts for such employment he knows, and takes on himself the risks and dangers incident to such [fol. 321] dangerous work, and his assumption of those obvious and inevitable risks is, in the very nature of things, part of his employment. It follows, therefore, that the employer violates no legal duty to the employe in failing to protect him from danger which cannot be escaped by anyone doing such work."

Connelly v. Penn. Ry., supra.

"In other words," said the Supreme Court of Missouri, " the train crew, so far as section men are concerned, have a right to expect a clear track, and the humanitarian rule when violated is the only salvation for the unfortunate section man."

Kirkland v. Bixby (Mo.), 222 S. W. 462.

Of course, if the servants operating this train had actually discovered the deceased in a position of peril, and apparently unaware of his danger, the most elementary principles of law and humanity would have required that they should do all that the time would admit to avoid injuring him. But there was no evidence to bring this principle of law into application.

The uncontradicted evidence was that section men, whose labors keep them on or about the track, were expected to be alert, and protect themselves against passing trains. (Record, pages 160, 174, 184 and 217.) The plaintiff's intestate, and experienced section man, knew this, and such were the instructions given by him to the section men employed under him:

"Q. What instructions did Mr. Nixon give you, if any, in respect to the section men looking out for trains?

A. He would caution us, and tell us to look out for trains, to be very particular about that, and for some one to watch one way, and some the other.

Q. Did you all understand that trains might come along the track at any time?

A. Most any time.

Q. Was that your experience, that trains would come along the track at any time?

A. Yes, sir.

[fol. 322] Q. You didn't know when they were coming?

A. No, sir.

Q. Did you expect the train men to be looking out for you, or did you look out for the train?

A. We looked out for the trains." (Record, page 160.)

They were likewise instructed that the engineman does not maintain a constant lookout ahead; that when necessary to signal a train to stop they must act on the assumption that the engineman was not looking out and give the signal by torpedoes in addition to the red flag, and that it was incumbent upon them always, to exercise constant vigilance to avoid being struck and injured by passing trains. (Record, page 217-8.)

In conclusion we earnestly submit that the injury complained of was not due to the neglect by the defendant company of any duty due to the deceased in respect to his protection from injury by the train in question, and we venture to urge upon the court, for the foregoing reasons, that a re-hearing may be granted.

Harrison, Long & Williams, Attorneys for the Chesapeake & Ohio Railway Co.

January 1, 1925.

[fol. 323] In Supreme Court of Appeals of Virginia

[Title omitted]

Order Denying Petition for Rehearing—Jan. 22, 1925

On mature consideration of the petition of the plaintiff in error to set aside the judgment entered herein on the 13th day of November, 1924, and grant a rehearing thereof, the prayer of said petition is denied.

A Copy. Teste:

H. Stewart Jones, C. C.

[fol. 324] In Supreme Court of Appeals of Virginia

[Title omitted]

Corrected Opinion

Judge Frederick W. Sims, President:

In this action there was a verdict and judgment for $12,000, recovered as a liability under the Federal Employers' Liability Act,

against the plaintiff in error, the Chesapeake and Ohio Railway Company (hereinafter called the defendant company, or company, in favor of Annie Nixon, administratrix of Sam Joe Nixon, deceased, (who will be hereinafter referred to as plaintiff and the decedent, respectively), for the death of said decedent, alleged to have been occasioned by the negligence of the defendant company, in that the engineman and fireman, (the employees of the latter operating a train which ran down and killed the decedent), failed to keep a reasonable lookout for the decedent just before he was killed, when he was upon the track going over it in a velocipede under the express permission of the defendant company, and when he was also engaged in the discharge of a duty incumbent upon him as an employee of the defendant company, of inspecting the track (over which the defendant company was, at the time, engaged in interstate commerce), to see if it was in a proper and safe condition. [fol. 325] The circumstances under which the decedent was killed, as shown by the uncontroverted evidence, were as follows:

The decedent was at the time he was killed, and had been for a number of years, a section foreman, his regular hours of employment on his section of the railroad being from 7 a. m. to 4 p. m. daily. For about a year next preceding his death he lived with his family in a house by the side of the railroad track on the north side of and opposite a curve in the track. The track, as it approached the point opposite this house, from east to west, came through a cut several hundred feet east of the house, on a curve which bent to the left, as it extended westward, until it reached a point 575 feet west of the point opposite the house, thence extended a distance of 1,377 feet in a straight line to a point beyond where the decedent was struck on the track by an extra freight train, consisting of engine, tender and ten gondola coal cars, and was killed, on a clear June day, at 6:35 o'clock in the morning. From thence the track extended on westward, practically straight, for a distance of nearly a mile. The section on which the decedent was foreman extended from a point east of his house to Midway, a point about 1¼ miles west of his home. The decedent and his force of men began their regular hours of work each morning at Midway, where the tool- [fol. 326] house was located, at 7 a. m., and ended such hours of work at the same place each afternoon at 4 o'clock. It was the daily custom of the decedent, foreman, and his men to meet at the tool-house from 7 to 20 minutes before 7 o'clock, so as to be ready to get out from the tool-house promptly at that hour. Prior to the beginning of his occupancy of the aforesaid dwelling house, the decedent asked and obtained the express permission of the Supervisor of track of the defendant company, his superior officer in charge of section foreman of the defendant company on that part of the system of the latter, to make use of a certain velocipede, after he moved into said house, in going to and from the tool-house at Midway. The velocipede was a three-wheeled vehicle, made to run over a railroad track, propelled by foot pedals, with a seat for the person using it, located directly over the right-hand rail of the track, geared so that it could travel only at a speed of about 9 or 10 miles an hour—

a slow enough speed for the person operating it to have time to inspect the track closely in going over it for any defects which might exist in it needing repair. And one of the rules of the defendant company, which the evidence tended to show, was, among others, faithfully observed by the decedent, imposed the duty upon the decedent, whenever he was going over the track, whether in or out of [fol. 327] his regular hours of employment, to inspect the track for the purpose aforesaid.

The decedent was seen by the plaintiff, his wife, to go down to the railroad track opposite his home, there put the velocipede on the track, take his seat, and set out thereon for Midway at 6:30 a. m. of the day he was killed, which the evidence tended to show was about his usual time for setting out for Midway each morning. After he had gone some distance he was seen by her to look back just before the train could be seen by him, and thereafter to go on his way, pedalling the velocipede along the track. Just at this moment she saw the train come around the curve above mentioned, dash by the front of the house and on behind the decedent, who was then seen by the wife with his face continuously turned forward, not again looking back while he was in her sight; and he was in her sight until the train interposed itself between her and him as he was proceeding on the track. The train must have overtaken him in a few seconds, as we must conclude from the speed of the train and the place where the body was found,—such speed being about 25 miles an hour, as estimated by the defendant's witnesses, and a greater speed is estimated by witnesses for the plaintiff. The body was found 1,952 feet west of the point opposite the dwelling house and lying on the north and right hand side of the track, about 9 [fol. 328] feet therefrom, on the side of the railway embankment. The head was crushed at the back; the velocipede was broken and scattered into small fragments, some of which were found at different places along the track; the watch of decedent had stopped at 6:35 o'clock. No signal of any kind was given by the train—after the engineman, if he had been on his seat, the fireman, had he looked, could have seen decedent and the position he was in in ample time for warning blasts of the whistle to have been given, and the train stopped, if the warning had not been heeded, as it was shown in evidence and uncontroverted that the train could have been brought to a standstill in 500 feet. The train went on, without stopping, until it reached the terminal of the run of its crew, which was at Gladstone, a few miles away. Neither the engineman nor the fireman were looking out at the time, and no one on the train saw the accident, or knew that anyone had been struck until the train reached Gladstone.

There was conflict in the evidence as to whether any wind was blowing at the time, which prevented the decedent from hearing a road crossing blast of the whistle, which was given just before the train came opposite the said dwelling, and from hearing the noise of the train itself as it approached him. There was the testimony [fol. 329] of several witnesses for the plaintiff, however, to the effect that there was a very strong wind at the time, blowing directly eastward, which carried the noise of said whistle blowing and of the

moving train away from the decedent; so that it was a reasonable inference that he did not hear it until it was upon him and struck him.

The engineman and fireman both testified as witnesses for the defendant company and both admitted that they were not keeping any lookout ahead from the time they would have seen the perilous position of the decendent until after they had gone past the place at which he was killed.

The reason the engineman gave for his keeping no lookout at the time just before the train turned the aforesaid curve and came upon the straight track of 1377 feet and the further stretch of comparatively straight track west of that,—altogether a mile or more of practically straight track,—is that he stood up on his seat to examine the lubricator and to adjust it, if it needed adjustment, which occupied him until the train had gone past the place where the decedent's body was afterwards found. He testified that this was a duty which he had to perform at some time as he neared the end of the train's run, which was Gladstone on this occasion; but that there was no particular need for him to have done this at the particular [fol. 330] time he did—that the same result would have been attained had he done it a short while afterwards, after he had reached the home of the decedent and the aforesaid stretch of track, extending therefrom toward Midway; or a short while before he reached the home of the decedent and the aforesaid stretch of track. He testified further that he knew the decedent well; knew that he was section foreman on that section, knew the location of his home and that he had to go from his home to his place of work; but claimed that he did not know at the time whether the decedent's regular hours of work began at 7 or 7:30 a. m.; that he did not know that the decedent used a velocipede in going to and from his work; that he knew that there was a path alongside the railway from decedent's home to his beginning place of work at Midway, and that he expected the decedent would have been in such path at the time the train was passing over this locality if he was then on his way to his work; and further to the effect that he had no idea that he owed any duty to keep a lookout for the decedent being on the track at the time, otherwise he would not have taken the time he did to attend to the lubricator.

The testimony of the fireman was to the effect that he saw the engineman when he stood on his seat for the aforesaid purpose, and that he knew the engineman was not then keeping a lookout; yet [fol. 331] that he, the fireman, did not thereupon keep a lookout; and knew that no one was keeping a lookout while the engineman was so engaged. The fireman's testimony on this subject is, in substance, that he was on his seat, from which he could have looked out of the side window and seen the decedent ahead a farther distance away, as they approached him, than the engineman could have seen him, owing to the curve of the track being in the fireman's favor and not away from his line of vision; that he may have been engaged himself in the performance of some duty, but he did not undertake to say whether he was so engaged or not; and the fact

made prominent by his testimony is that he had no idea that he owed any duty of keeping a lookout for the decedent being on the track at the time; otherwise, as may be reasonably inferred from his testimony, he could have spared the time from his other duties to and would have done so.

There was testimony by the plaintiff to the effect that, as the train dashed by her, as aforesaid, she saw the engineman and fireman on the deck between the engine cab and the tender, laughing and talking; which it is claimed on the part of the defendant company is incredible, because of certain physical facts shown in evidence. In view of the testimony of the engineman and fireman and of the opinion thereon expressed below, further reference to the testimony [fol. 332] on this subject is omitted as upon an immaterial issue of fact.

There was also testimony of the plaintiff to the effect that while she could not see the decedent when he was struck on the track by the train, she did see him as he was thrown from the track; which, likewise, it is claimed in behalf of the defendant company is incredible, because of certain physical facts in evidence. Reference to this evidence in detail is also omitted as immaterial, in view of the consideration that the other evidence on the subject, above mentioned, was ample to warrant the jury in finding that the decedent was killed under the circumstances thereby disclosed as above set out.

There was testimony for the defendant company to the effect that the decedent was accustomed, prior to the accident, to take with him to Midway, when he went there each morning, bran to give his cow, (which was in a pasture there adjacent to the tool-house), while milking her; and that he was accustomed to milk this cow sometimes in the morning after getting to Midway, between his arrival and his going to work for the defendant company at 7 o'clock, and sometimes in the evening after his regular hours of work for the company were over. The plaintiff in her testimony stated positively [fol. 333] that the cow was not being milked by anyone during a certain period which covered the time of the accident. It is claimed, however, on the part of the defendant company, for reasons which need not be mentioned, that this testimony of the plaintiff is likewise incredible. But since the cow-milking, if it was accustomed to be done by the accused, as stated in the testimony for the defendant company, is relied on merely to support the position that the accused, when killed, was on his way to milk the cow—a business of his own—so that he was not then engaged about his master's business, showing that the relationship of master and servant did not then exist between him and the company; and since the evidence is uncontroverted as above stated, from which the inference is to be drawn that the decedent, while on his way to Midway and when killed, was engaged in inspecting the track, a duty imposed upon him as incident to his employment; so that he was then unquestionably about his master's business; detailed reference to the testimony, pro and con, on the subject of the cow-milking is also omitted as immaterial.

Sims, P., after making the foregoing statement, delivered the following opinion of the court:

The question presented by the assignments of error will, so far as necessary for the decision of the case, be disposed of in their order [fol. 334] as stated below.

The chief question thus presented, in various ways,—(by the assignments that the trial court erred in overruling the motion to set aside the verdict, and in the giving and refusing of instructions)—is the following:

1. Did the defendant company owe to the decedent the duty of having its engineman and fireman keep, while not prevented from so doing by necessary attention, in the exercise of reasonable care, to their other duties, a reasonable lookout ahead for his being on the track in front of the train which killed him on the velocipede he was then using, while traversing, at his usual time in the morning for so doing, that portion of the track which was between his home and Midway, under the express permission given him by the company to so use such track?

The question must be answered in the affirmative.

It appears from the evidence that the decedent had the express permission of the defendant to so traverse the portion of the track mentioned at such time. He was going to and from the place of business in which he was employed by the defendant, along its tracks, in a vehicle provided by it, and at the usual time. As a track repairer he was not a licensee, but, under the circumstances in [fol. 335] which he was using the track, although a track repairer, the defendant company owed him the duty of having its engineman or fireman, on the train which killed him, while not prevented from so doing by necessary attention, in the exercise of reasonable care, to their other duties, keep a reasonable lookout ahead for his being on the track in front of the train while it was going over the portion of the track in question.

Several positions are taken in argument in behalf of the defendant company, to the effect that the duty in question, on the part of the defendant, did not exist in the instant case; but as these positions are all based on the assumption of fact that the deceased was not a licensee, and that the defendant owed him no higher duty that that owing to any other track repairer in the discharge of his ordinary duties, it is unnecessary for us to deal with them, or with the authorities cited to sustain such positions. The duty owing to the plaintiff's intestate was not because he was a licensee in the usual acceptation of that term, but because the privilege granted him gave him the right to expect, and imposed upon the defendant the duty to exercise, a higher degree of care for his protection than if he were simply in the discharge of his ordinary duties as a track repairer."

The following subsidiary questions are also presented by the assignments of error:

[fol. 336] 2. Did the necessary attention, in the exercise of reasonable care, to their other duties, prevent the engineman from keeping the reasonable lookout ahead above mentioned? And was the

failure to keep such lookout the proximate cause of the death of the decedent?

The first branch of the question must be answered in the negative, and the second in the affirmative.

Laying aside the consideration of any other evidence on this subject, other than the testimony of the engineman and fireman, we see that it affirmatively appears from that testimony that there was no necessary attention at the time to any other duty which prevented the engineman from keeping a lookout ahead for the decedent being on the track in front of the train. According to this very evidence, the engineman could have given the necessary attention to the lubricator, about which he was engaged at the time, equally as well at some other time, which would not have interfered with his keeping the aforesaid lookout. And according to this very testimony too, the real reason why the engineman did not keep such lookout at the time was that he had not been informed and did not consider that it was his duty to keep any lookout for the decedent. Having given the decedent the express permission aforesaid to use the track as he was doing, it was the duty of the defendant company to have had the engineman instructed that it was his duty to keep the aforesaid reasonable lookout for the decedent. Hence, the ignorance of the engineman on the subject aforesaid furnished no defence to the defendant in the premises. And, since it is apparent from the circumstances shown in evidence that had such lookout been kept, the perilous position of the decedent just before he was killed, and his obvious unconsciousness thereof, would have been discovered and the accident, by the exercise of reasonable care on the part of the engineman, could have been prevented, it is also apparent that the failure to keep such lookout was the proximate cause of the death of the decedent.

[fol. 337] 3. Was the decedent engaged in interstate commerce at the time he was killed?

The question must be answered in the affirmative.

The positions taken in behalf of the defendant company, and the authorities cited in support thereof, do not controvert the fact that the track was being used by the defendant company in the transportation of interstate commerce; nor the correctness of the conclusion that the decedent was engaged in interstate commerce at the time he was killed, if he was then engaged in discharging a duty incident to his employment, of inspecting the track. That the latter was a fact is a reasonable inference from the uncontroverted evidence, and, hence, in view of the verdict of the jury, must be regarded by us as an established fact in the case. That being so, any discussion of the aforesaid positions, or of the authorities cited in support thereof, would be irrelevant, and therefore will not be entered upon.

4. Are the cases of Southern Railway Co. v. Hall, 102 Va. 137, and Same v. Adams, 129 Va. 233, controlling authority to the effect that there can be no recovery against the defendant company in the instant case, for the reason that there is such an absence of evidence as to the situation at the time the decedent was killed as to leave it

[fol. 338] a mere matter of speculation and surmise as to whether the death was caused by the negligence of the defendant, or solely by the contributory negligence of the decedent.

The question must be answered in the negative.

It is true that in the instant case, as in the cases in question, there was no eyewitness of the accident itself. But there the similarity between the cases ends. In the instant case the circumstances, shown by the uncontroverted evidence, put before the jury the whole situation shortly preceeding and practically almost up to the very instant of the accident; thus furnishing evidence from which the situation at that very instant might be inferred by the jury with all of the certainty that would be required even in a criminal case. And that situation, as so inferred, presents a case, in which, for the reasons above stated, the death of the decedent appears to have been proximately caused by the failure of the defendant company to discharge the duty incumbent on it, as above held, of having its engineman and fireman keep a reasonable lookout ahead for the decedent being on the track.

The case will have to be affirmed.

A copy. Teste: H. Stewart Jones, C. C.
A copy. Teste: H. H. Wayt, Clerk.

[fol. 339] In Supreme Court of Appeals of Virginia

[Title omitted]

Præcipe for Transcript of Record

To the Clerk of the above-entitled Court:

You are hereby requested to make a transcript of the record of this cause to be used in an application to the Supreme Court of the United States for a Writ of Certiorari in said cause, the transcript to consist of:

The record on appeal in said cause;

The opinion of the Supreme Court of Appeals of the State of Virginia, and any modification thereof;

All orders contained in the records and proceedings of the Supreme Court of Appeals of the State of Virginia, relating to said cause;

The final judgment and decision of the Supreme Court of Appeals of the State of Virginia;

Your certificate to the record that it is a complete record in said cause.

Randolph Harrison, Attorney for the Chesapeake & Ohio Railway Company.

Dated this 28th day of January, 1925.

[fol. 340] IN SUPREME COURT OF APPEALS OF VIRGINIA

CLERK'S CERTIFICATE

I, H. H. Wayt, Clerk of the Supreme Court of Appeals of Virginia, at its place of session at Staunton, Virginia, do hereby certify that the foregoing volume, and the present volume, constitute a true, full and complete transcript of the record and proceedings, entitled in this Court "The Chesapeake and Ohio Railway Company vs. Annie Nixon, Administratrix of Sam Joe Nixon, deceased," consisting of two volumes including the present volume, to-wit:

Volume one, composed of the following:

1st. Copy of the printed record pages 1 to 289 inclusive, together with two blue prints.

2nd. Transcript of the two orders of the Supreme Court of Appeals of Virginia, showing the submission of the said cause to the Judges of the said Supreme Court of Appeals of Virginia.

3rd. Copy of the opinion of the said Court in said cause delivered on November 13th, 1924.

4th. A transcript of the order of the said Court entered therein in pursuance of said opinion.

Volume two, composed of the following:

1st. Printed petition to the said Supreme Court of Appeals of Virginia asking for a re-hearing, pages 1 to 12 inclusive.

2nd. Order of January 6th, 1925, on petition to re-hear.

3rd. Order of January 22nd, 1925 on petition to re-hear.

4th. Corrected opinion of said Court, manuscript 1 to 15 inclusive.

5th. Request of "The Chesapeake and Ohio Railway Company" for a complete transcript of the record in the said cause.

[fol. 341] In testimony whereof, I have here-nto set my hand and affixed the seal of the said Supreme Court of Appeals of Virginia, at its place of session at Staunton, in the State of Virginia, this 3rd day of February, 1925.

H. H. Wayt, Clerk of the Supreme Court of Appeals of Virginia, at Staunton. (Seal of the Supreme Court of Appeals of Virginia. Staunton.)

IN SUPREME COURT OF APPEALS OF VIRGINIA

JUDGE'S CERTIFICATE TO CLERK

I, Robert R. Prentis, Presiding Judge of the Supreme Court of Appeals of Virginia, do hereby certify, that the foregoing is the true and genuine signature of H. H. Wayt, Clerk of the Supreme Court of Appeals of Virginia, at Staunton, and that the foregoing attestation in the case of "The Chesapeake and Ohio Railway Company vs. Annie Nixon, Administratrix of Sam Joe Nixon, deceased," is in due form.

Witness my hand and seal this 10" day of February, 1925.

Robert R. Prentis. (Seal.)

IN SUPREME COURT OF APPEALS OF VIRGINIA

CLERK'S CERTIFICATE TO JUDGE

I, H. H. Wayt, Clerk of the Supreme Court of Appeals of Virginia, at Staunton, do hereby certify that the Honorable Robert R. Prentis, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, Presiding Judge of the Supreme Court of Appeals of the State of Virginia, duly commissioned and qualified.

Witness my hand and the seal of said Court this 11th day of February, 1925.

H. H. Wayt, Clerk of the Supreme Court of Appeals of Virginia, at Staunton. (Seal of the Supreme Court of Appeals of Virginia. Staunton.)

[fol. 342] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 13, 1925

The petition herein for a writ of certiorari to the Supreme Court of Appeals of the State of Virginia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILED
MAR 7 1925

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1925

271
6

No. [redacted] 306

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
PETITIONER,

vs.

ANNIE NIXON, ADMINISTRATRIX OF THE ESTATE OF SAM JOE NIXON, DECEASED.

PETITION FOR A WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

RANDOLPH HARRISON,
A. R. LONG,
S. H. WILLIAMS,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 966.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
PETITIONER,

vs.

ANNIE NIXON, ADMINISTRATRIX OF THE ESTATE OF SAM JOE NIXON, DECEASED, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

To the Honorable the Supreme Court of the United States:

Your petitioner, The Chesapeake & Ohio Railway Company, a common carrier engaged in interstate commerce, respectfully represents that it is aggrieved by a judgment of the Supreme Court of Appeals of Virginia, the highest court of the State of Virginia in which a decision can be had, entered on the 13th day of November, 1924 (rehearing denied January 22nd, 1925), in a certain action at law wherein

petitioner was plaintiff in error and Annie Nixon, Administratrix of Sam Joe Nixon, deceased, was defendant in error.

This action was commenced in the Circuit Court of Nelson County, Virginia, for damages for the death of Sam Joe Nixon, which was alleged to have been caused by the negligence of the agents or employees of the petitioner in the operation of said railway. The original suit was brought under the Federal Employers' Liability Act, as well as the Virginia Employers' Liability Act and the Virginia laws governing death by wrongful act, damages being laid under the Virginia statutes at $10,000.00, the maximum recovery allowed by said statute (See Appendix), and at $25,000.00 under the Federal Employers' Liability Act. As the verdict of the jury was for $12,000.00, the recovery must be sustained, if at all, under the Federal law.

Your petitioner avers that in the trial of said cause a right, privilege or immunity was claimed by your petitioner under the aforesaid statute of the United States, as will afterwards appear, and the decision of the Court was against said right, privilege or immunity.

Your petitioner demurred to the notice of motion by which the action was commenced on the ground that,

> (1) The notice alleges no duty owing by the defendant to the plaintiff's intestate, the breach of which constitutes actionable negligence.
>
> (2) It appears from the notice of motion that the plaintiff's intestate assumed the risk of injury from sources mentioned in said notice of motion.

which demurrer the trial court overruled.

At the trial of the said cause it appeared in evidence that the said Sam Joe Nixon, at the time of his death, had been

for some years employed by the petitioner as a section foreman in charge of the maintenance and repair of a section of its track. He occupied as a residence a house owned by your petitioner situated adjoining the right of way and distant about one and a quarter miles from the tool house at Midway Mills, the place where he commenced his day's work each morning at 7 a. m. In going to and from his work he had obtained permission of your petitioner to make use of a velocipede which ran on the rails and was propelled by the rider. On the morning of June 21, 1921, shortly after leaving his home at 6:30 a. m., Nixon was found dead by the side of the track with the velocipede broken to pieces near him. Although there were no eyewitnesses to the occurrence, the inference is that he was struck by an extra freight train which came along at about that time, the crew of which were maintaining no lookout for him, being engaged at the moment in attending to other necessary duties in connection with the operation of said train, and knew nothing of the accident until they were told of it upon reaching the terminal a few miles distant.

Upon the trial your petitioner defended upon the ground that

> IT OWED NO DUTY TO TRACK EMPLOYEES ENGAGED IN INTERSTATE COMMERCE TO MAINTAIN A LOOKOUT FOR THEM OR TO WARN THEM OF THE APPROACH OF TRAINS.

Your petitioner, defendant in the trial court, upon the conclusion of the evidence, asked the following instruction:

> "The Court instructs the jury that the employees of a railway company engaged in the maintenance and repair of a railroad track, whose business it is

> to keep the track in safe condition for the movement of trains, must maintain a lookout at all times for the approach of such trains and for their own safety, and the employees operating such trains have the right to assume that the track employees will keep the track free from obstructions, and consequently they owe no duty to such track employees of maintaining a lookout for them or of warning them of the approach of the trains."

The Court refused to give this instruction, to which action of the Court your petitioner excepted.

Your petitioner relied upon the further defense that

> THE DECEDENT, IF ENGAGED IN INTERSTATE COMMERCE, ASSUMED THE RISK OF INJURIES FROM TRAINS ON WHICH NO LOOKOUT WAS BEING KEPT FOR TRACK EMPLOYEES.

It appeared in evidence that the engine crews, while engaged in the performance of necessary duties about the engine, customarily kept no lookout for track employees, which custom and practice were known to Nixon. It also appeared that the said Nixon knew that a train might be expected to overtake him at any time without warning and that the crew might not be on the lookout for him.

Under this evidence your petitioner asked the trial Court to instruct the jury as follows:

> "The Court instructs the jury that an employee of a railway company in accepting employment as a section foreman thereon, assumes all the ordinary risks that are necessarily and normally incident to the occupation in which he engages, whether the em-

> ployee is actually aware of such risks or not. And if the jury believe from the evidence that the railway company customarily ran its trains over its tracks at or near the point of the accident in question at any time in either direction, and without maintaining a lookout for track men at such times as the engineer and firemen were engaged in the performance of necessary duties about the engine, then they are instructed that the plaintiff's intestate likewise assumed the risk of danger from such cause, and the plaintiff cannot recover in this action."

The Court refused to give this instruction, to which action of the Court your petitioner excepted.

The jury rendered a verdict of $12,000.00 against your petitioner, upon which the trial Court entered a judgment which was affirmed by the Court of Appeals, the highest court in which a decision could be had, thus rendering final judgment against your petitioner.

The Supreme Court of Appeals found that the plaintiff's intestate was employed at the time of his death in interstate commerce and that the verdict and judgment were "recovered on a liability under the Federal Employers Liability Act," but the said Court was of opinion that it was "unnecessary to deal with" the defenses relied upon by your petitioner, or "with the authorities cited to sustain such positions," on the ground that

> "these positions are all based upon the assumption of fact that the deceased was not a licensee and that the defendant owed him no higher duty than that owing to any track repairer in the discharge of his ordinary duties."

It therefore appears that in said cause your petitione claimed and especially set up a right, privilege or immunity under a statute of the United States, namely, the act en titled "An Act relating to the Liability of Common Carrier by Railroad to their Employees," approved April 22, 190 (35 Stats. at Large, 65), and the decision was against such right, privilege or immunity, and also in conflict with the decisions of this Court and other Federal Courts, as will appear from the decisions in the following cases:

Aerkfetz v. Humphreys, &c., Receivers, 145 U. S. 418;

Connelly v. Pa. Ry. Co., 201 Fed., 54, 119 C. C. A. 392;

Davis v. P. & R. RR. Co., 276 Fed., 187;

Seaboard Air Line Ry. Co. v. Horton, 233 U. S., 492;

Pryor v. Williams, 254 U. S., 43;

B. & O. Ry. Co. v. Baugh, 149 U. S., 368;

Coine v. Union Pac. Ry. Co., 133 U. S., 370;

N. & W. Ry. Co. v. Gesswine, 144 Fed., 56, 75 C. C. A., 214.

Your petitioner files herewith as an exhibit hereto a certified copy of the entire transcript of the record of said case, including the proceedings in the Supreme Court of Appeals of Virginia.

Your petitioner submits that the questions herein involved are of such general interest and importance as to warrant this Court in reviewing them.

Therefore your petitioner respectfully prays that a writ of certiorari may issue, directed to the Supreme Court of Appeals of Virginia, commanding it to certify its record herein

to this Court for review and determination by it; that a writ of supersedeas may issue to the judgment aforesaid; that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate, and that said judgment of the Supreme Court of Appeals of Virginia may be reversed by this honorable Court.

THE CHESAPEAKE & OHIO
RAILWAY COMPANY,
By RANDOLPH HARRISON,
A. R. LONG,
E. H. WILLIAMS,
Counsel for Petitioner.

Notice of Submission of Petition for Writ of Certiorari.

To Annie Nixon, Administratrix of Sam Joe Nixon, deceased:

You are hereby notified that the undersigned will, on the 23d day of March, 1925, at 12 o'clock Noon, or as soon thereafter as counsel can be heard, submit to the Supreme Court of the United States at Washington a petition for a writ of certiorari, copy of which together with a brief in support thereof is hereto attached, to review a judgment of the Supreme Court of Appeals of Virginia, entered on the 13th day of November, 1924, a rehearing of which was refused on January 22nd, 1925, affirming upon writ of error a judgment of the Circuit Court of Nelson County, Virginia, entered on the 9th day of June, 1923, in an action at

law wherein the undersigned was defendant and you were plaintiff.

Respectfully,

THE CHESAPEAKE & OHIO
RAILWAY COMPANY,
By RANDOLPH HARRISON,
A. R. LONG,
S. H. WILLIAMS,
Counsel for Petitioner.

Acknowledgment of Service of Notice.

I hereby acknowledge legal service upon me of the foregoing notice and the accompanying petition and brief.

Given under my hand this the 5th day of March, 1925.

DUNCAN DRYSDALE,
Counsel for Annie Nixon, Administratrix of Sam Joe Nixon, Deceased, Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement of Facts.

Sam Joe Nixon for ten years prior to his death had been in the employ of your petitioner in the capacity of section foreman and was employed as such at the time of the accident which resulted in his death on June 21, 1921. He was an experienced track man and thoroughly familiar with the work and its dangers and the section of the track on which he lived and was employed. He knew that it was not customary for train employees to look out for track men and that they must, therefore, keep a constant lookout for their own safety, to avoid injury from passing trains which might be expected from either direction at any time. (Rec. pp. 160, 174, 184, 217.) A year or more before the accident he asked permission of his immediate superior and obtained his consent to use a velocipede in going to and from his work, for his own personal convenience. (Rec. p. 216.) During working hours this velocipede was used by a member of his force in making a daily inspection of the track embraced in their section (p. 111).

Respondent testified that the deceased started at 6:30 o'clock in the morning of June 21, 1921, "as was his custom," on the velocipede, to go to the tool house a mile and a quarter distant, at which point he was to join his gang of section laborers and commence the day's work for your petitioner in the repair and maintenance of its track, his hours of employment being from 7 a. m. to 4 p. m. About an hour later he was found dead by members of the section force,

lying a few feet from the track, at a point 1,967 feet west of the Nixon house. Broken pieces of the velocipede were lying near the track. His watch had stopped at 6:35 a. m. There was no eyewitness to the accident but the inference was that he was struck and killed by an extra freight train going in the same direction, which passed about that time, the crew of which knew nothing of the accident, being engaged at the moment in attending to other necessary duties in connection with the operation of said train.

The engineer in charge of the engine was thoroughly experienced and familiar with his duties and had been in the employment of your petitioner thirty-two years, nine years as fireman and twenty-three years as locomotive engineer. The fireman had been in the employment of your petitioner as fireman and extra engineman thirteen years and was likewise thoroughly experienced and familiar with his duties. The uncontradicted evidence showed that it was customary and usual for the engineman to leave his position of lookout when it became necessary to give attention to the mechanism of the engine and that it frequently happens when this is the case that the engine proceeds for short periods of time without any lookout being maintained. (Rec. p. 239.)

The engineman testified that at the time when the train was passing the Nixon house, about 1,967 feet east of the point where the deceased was found, having no reason to anticipate the presence of any one on the track, and there being no crossings for nearly two miles and having a "clear track" to the terminal at Gladstone, he made use of the opportunity to give the necessary attention to the lubricating mechanism of the engine. (Rec. pp. 228-238.) Both the engineman and fireman testified that the point selected by

the engineman for performing this work was the safest that could have been selected. (Rec. pp. 240-247.) The duty involved the inspection of a device known as the lubricator which was located in the top of the engine cab, the function of which was to furnish oil to the cylinders and valves on the locomotive. In order to see to the proper lubrication of the engine, the engineman had to make an inspection from time to time of this mechanism and adjust the flow of oil in the lubricator, which could only be done by standing on his seat and using an electric light. This is one of the most important things in the smooth working of the engine. (Rec. p. 229.) The performance of this necessary duty occupied him one or two minutes and he was so engaged as he passed the Nixon house. In anticipation of attending to this duty, he took the extra precaution before mounting his seat to blow the whistle of the engine. (Rec. p. 230.) When he resumed his seat again, after the lapse of a minute or two, the train had passed the Nixon house and the point where the deceased was found. During this time the fireman testified that he was engaged in the performance of the necessary duties in connection with the firing of his engine and that by reason of his attention to these duties he was not maintaining a lookout. The engineman and fireman knew nothing of the accident until they heard of it after the train reached the division point at Gladstone, a few miles further on. (Rec. pp. 229, 230.)

The trial Court refused instructions offered by your petitioner to the effect that your petitioner owed the deceased, a track employee, no duty of lookout, and that the deceased assumed the risk of injury from passing trains operated without a lookout for him.

The jury awarded the plaintiff the sum of $12,000.00 under the Federal Employers Liability Act as damages for the death of her intestate, and the trial Court entered judgment for the respondent, to which a writ of error was awarded from the Supreme Court of Appeals of Virginia. That Court in an order entered on the 13th day of November, 1924, affirmed the judgment. A petition for a rehearing was entertained but a rehearing denied on the 22nd day of January, 1925.

Decision of the Court.

In the opening paragraph of the statement of facts preceding the opinion, it is said that the decedent was going over the defendant's track "as a licensee under the express permission of the defendant company." After completing the statement of facts the Court states the question of law to be decided as follows:

> "The chief question thus presented in various ways * * * is the following:
>
> 1. Did the defendant company owe to the decedent the duty of having its engineman and fireman, while not prevented from so doing by necessary attention in the exercise of reasonable care to their other duties, a reasonable lookout ahead for his being on the track in front of the train which killed him, on the velocipede he was then using, while traversing at his usual time in the morning for so doing that portion of the track which was between his home and Midway (at which point the tool house was located) under the express permission given him by the company to use such track."

This question, which the Court considers the chief question in the case, is answered as follows: (Italics supplied.)

> "The question must be answered in the affirmative.
>
> "It appears from the evidence that the decedent had the *express permission* of the defendant to so traverse the portion of the track mentioned at such time. He was, therefore, undoubtedly a *licensee* at the time, and, under the settled rule on the subject in this jurisdiction, the defendant company owed him the duty of having its engineman and fireman on the train which killed him, while not prevented from so doing by necessary attention, in the exercise of reasonable care, to their other duties, keep a reasonable lookout ahead for his being on the track in front of the train while it was going over the portion of the track in question.
>
> "That such is the settled rule, certainly in this jurisdiction, if the decedent was a *licensee*, is not controverted in argument before us. Several positions are, indeed, taken in argument on behalf of the defendant company, to the effect that the duty in question did not exist in the instant case; but as these positions are all based on the assumption of fact that the deceased was not a *licensee*, it is unnecessary for us to deal with them, or with the authorities cited to sustain such positions. * * *
>
> "Having *given the decedent the express permission to use the track as he was doing*, it was the duty of the defendant company to have had the engineman instructed that it was his duty to keep the aforesaid reasonable lookout for the decedent."

The Court found it unnecessary to pass upon the defenses relied upon by your petitioner, and the authorities cited to sustain them, on the ground that "these positions are all

based on the assumption of fact that the deceased was not a licensee."

If Nixon was an employee engaged in interstate commerce at the time of his death, as the Court holds—and as must be the case in view of the fact that the judgment is for $12,000.00, being $2,000.00 more than the Virginia Statutes allow—then he was not a licensee, and the decisions of the Supreme Court of the United States, the other Federal courts and innumerable State courts on the law relating to track men struck by trains apply and cannot be ignored by calling Nixon a licensee and applying the licensee doctrine to an employee engaged in interstate commerce.

On the other hand, if Nixon was a licensee, the judgment will have to be reversed because the case then comes under the Virginia law and the maximum recovery under that law is $10,000.

When a rehearing was denied the Court corrected its opinion by striking out the words "as a licensee," in the seventh line from the bottom of page 1, and by striking out the foregoing two paragraphs beginning with the words "It appears," on page 11, eighth line from the bottom, and ending with the word "positions," on page 12, eleventh line from the bottom, and inserting in lieu thereof the following:

> "It appears from the evidence that the decedent had the express permission of the defendant to so traverse the portion of the track mentioned at such time. He was going to and from the place of business in which he was employed by the defendant, along its tracks, in a vehicle provided by it, and at the usual time. As a track repairer he was not a licensee, but, under the circumstances in which he

was using the track, although a track repairer, the defendant company owed him the duty of having its engineman or fireman, on the train which killed him, while not prevented from so doing by necessary attention, in the exercise of reasonable care, to their other duties, keep a reasonable lookout ahead for his being on the track in front of the train while it was going over the portion of the track in question.

"Several positions are taken in argument in behalf of the defendant company, to the effect that the duty in question, on the part of the defendant, did not exist in the instant case; but as these positions are all based on the assumption of fact that the deceased was not a licensee, and that the defendant owed him no higher duty than that owing to any other track repairer in the discharge of his ordinary duties, it is unnecessary for us to deal with them, or with the authorities cited to sustain such positions. The duty owing to the plaintiff's intestate was not because he was a licensee in the usual acceptation of that term, but because the privilege granted him gave him the right to expect, and imposed upon the defendant the duty to exercise, a higher degree of care for his protection than if he were simply in the discharge of his ordinary duties as a track repairer."

The Court again found it "unnecessary to deal with" the defenses relied upon by your petitioner or "with the authorities cited to sustain such positions," on the ground that

> "these positions are all based upon the assumption of fact that the deceased was not a licensee and that the defendant owed him no higher duty than that owing to any other track repairer in the discharge of his ordinary duties,"

and the Court held that the duty owing to him (of maintaining a lookout) was not because he was a licensee "in the usual acceptation of that term," but because the privilege granted him (of using a velocipede in going to and from his work)

> "gave him the right to expect, and imposed upon the defendant the duty to exercise towards him, a higher degree of care for his protection than if he were simply in the discharge of his ordinary duties as a track repairer."

The decisions of the Supreme Court of the United States and the other Federal courts cannot be ignored by saying that Nixon was not a licensee *in the usual acceptation of that term*. In law he cannot be an employee engaged in interstate commerce and a licensee, *in any acceptation of the term*, at the same time. He must be without qualification either one or the other. His status as a licensee is not an assumption of fact, but must be a conclusion of law based upon the facts.

The Court assumes that because the petitioner assented to Nixon's request to be allowed to use a velocipede for his own convenience in going to and from his work, it assumed the duty to exercise "a higher degree of care for his protection than if he were simply in the discharge of his ordinary duties as a track repairer," and that he was thereby relieved of all responsibility to keep a lookout for his own protection. In using the track in going to his work he was as much engaged in an ordinary duty as a track repairer as he would have been if he had been at work upon the track. The danger of being on the track, whether on foot or on a velocipede, arising from the operation of trains in either direction

at any time, was known to him and the risk voluntarily assumed by him.

Specifications of Error.

1. The Supreme Court of Appeals of Virginia erred in affirming the action of the trial Court in refusing petitioner's instruction on the duty of maintaining a lookout for track men employed in interstate commerce.

2. The Supreme Court of Appeals of Virginia erred in affirming the action of the trial Court in refusing petitioner's instruction on the assumption of risks by track men employed in interstate commerce.

ARGUMENT.

1. The petitioner owed no duty to track employees engaged in interstate commerce to maintain a lookout for them or to warn them of the approach of trains.

It is settled by the decisions of the Federal courts, both lower and appellate, as well as the State courts in all sections of the country, that a railroad company owes track men engaged in work upon the track, or in using the track in going to and from their work, no duty of warning or lookout. *Connelly v. Pa. Ry. Co.*, 201 Fed., 54, 119 C. C. A., 392.

The evidence plainly discloses that there was nothing unusual in the operation of the train. There was no violation of a statutory requirement, nor was there any failure of compliance with any orders, or recognized custom or rule adopted for the safety of employees. There could be no custom or rule requiring a lookout for track men, be-

cause it would be impossible to know when or where to look out for them. (Rec. p. 217.) In the absence of evidence showing that those in charge of the engine were aware of Nixon's presence on the truck where he was injured, or having discovered him, recklessly ran him down, they should not be held guilty of negligence.

In *Aerkfetz v. Humphreys*, 145 U. S., 418, where an experienced truck man was injured by a moving train in a switching yard, Mr. Justice Brewer, who delivered the opinion of the Court, said:

> "As an employe of long experience in that yard he was familiar with the moving of cars backward and forward by the switch engines. * * * He knew that the switch engine was busy moving cars and making up trains, and that at any minute cars were likely to be moved along the track upon which he was working. * * * There could have been no thought or expectation on the part of the engineman, or of any other employe that he, thus at work in a place of danger, would pay no attention to his own safety. Under such circumstances what negligence can be attributed to the parties in control of the trains, or the management of the yard. They could not have moved the cars at any slower rate of speed. They were not bound to assume that any employe familiar with the manner of doing business would be wholly indifferent to the going and coming of the cars. There were no strangers whose presence was to be guarded against. The ringing of bells and the sounding of whistles on trains going out coming, and switch engines moving forward and backward, would have simply tended to confusion. The person in direct charge had a right to act on the belief that the various employes in the yard, familiar with the continuously recurring movement

of the cars, would take reasonable precaution against their approach. * * * We see in the facts as disclosed no negligence on the part of the defendant."

In *Connelly v. Pa. Ry. Co.*, 201 Fed., 58, 119 C. C. A., 392, where an experienced truck man was killed on its main line in the city of Philadelphia by a train operated by the defendant company, through its negligent failure, as alleged, to give him "due and proper warning of the approach of said train," the Court said:

"We are clear they (the facts) disclose no negligence on the part of the railroad in operating its train and that the deceased's death instead of being caused by any negligence or want of care on the part of the railroad was caused by the risks incident to the employment he followed.

"It is obvious that even when a railroad operates its trains and moves its switch drafts in a proper and careful manner track walkers and repair men are necessarily subjected to great risks. Their very occupation is one of constant peril. Indeed, it follows from the nature of such employment that the duty of self preservation has to rest on them, for no adequate protection other than self protection can be afforded them. And such has been the reasonable holding of the law." Citing *Lovejoy v. Pittsburgh, etc.*

In *Davis v. P. & R. R. R. Co.*, 224 Fed., 187, where an experienced truck man was killed on the main line of the defendant company, the Court said:

"In the absence of evidence that those in charge of the engine were aware of Davis's presence on the track, where he was employed, or that any circumstances

him recklessly ran him down, they should not be held guilty of negligence. To hold to the contrary would indeed unreasonably burden those charged with the grave and responsible duty of operating the instruments of conveyance by rail. It would shift the entire responsibility of caring for the safety of those employed upon the track and place it upon the shoulders of those having to do with the operation of the engine and train, involving attention to signals of every degree of importance, and entirely relieve those who have nothing but their own safety at stake." Citing *Connelly v. Pa. Ry. Co., supra.*

In *Bennett v. A. T. & S. F. Ry. Co.* (Iowa), 183 N. W., 424, the plaintiff's intestate was a track walker who had been in the employ of the company four or five years, and was killed while in the performance of his duties by a passenger train, the crew of which did not see him. The plaintiff relied upon the failure of the defendant to give warning of the approach of its train, as negligence, upon which subject the Court said:

"It is not customary nor is it obligatory to notify a track man of the running of trains, and although Bennett had the right to use the track in the performance of his duties he was bound to know that a train might put in an appearance at any moment, and it was obligatory upon him to look out for his own safety. His duty was as clear as its performance was easy."

In *Kirkland v. Bixby* (*Mo.*), 222 S. W., 462, the defendant was sued for damages resulting from the death of a section foreman while riding on a hand car over the track of the defendant company. The plaintiff's case was submitted

to the jury on the sole ground that the agents in charge of the east-bound freight train were negligent in failing to give the deceased warning of the approach of the train. The Court said:

> "The rule in this state requires section men to protect themselves from passing trains. In other words, the train crew, so far as section men are concerned, have a right to expect a clear track, and the humanitarian rule when violated is the only salvation for the unfortunate section man."

In *Land v. Railroad Company*, 95 Kansas, 441, it was held that a railroad company ordinarily owes no duty to warn section men while at work upon the track of the approach of trains, save when such employees are found in places of danger and it becomes apparent that they will not, or cannot protect themselves. The Court said:

> "Railroads must operate their passenger trains and transport their passengers without impeding their progress or imperiling their safety by the necessity of making it a condition precedent to see if its section men employed for the purpose of keeping the track safe while trains are running over it are themselves looking out for their approach. * * * Track men are employed for the very object and purpose of enabling the railroad to furnish such service and cannot require the employer to impair its efficiency by acting as watchman for them."

2. The deceased, a track repairer employed in interstate commerce, assumed the risk of injury from trains operated without a lookout for him.

It is now well settled that except as to violations of Fed-

eral statutes enacted for the safety of employees, the defense of assumption of risk is a complete bar to the action.

Seaboard Air Line Ry. Co. v. Horton, 233 U. S., 492;
Pryor v. Williams, 254 U. S., 43.

The uncontradicted evidence shows that track men are instructed in regard to the danger and risk arising from the operation of trains in either direction at any time, and of their obligation and duty to keep the track free from obstructions for the uninterrupted passage of trains. They are likewise instructed that the engineman does not maintain a constant lookout ahead; that when necessary to signal a train to stop they must act on the assumption that the engineer is not looking out, and give the signal by torpedoes in addition to the red flag, and that it is incumbent upon them always to keep a lookout for their own safety, and by constant vigilance avoid being struck and injured (Record, pages 216-17).

The rule is thus stated in Elliott on Railroads, Vol. 4, Section 1862:

> "Ordinarily section men or track men assume the risks incident to the running of trains, whether extra trains or trains running on schedule. Section employees are bound to know that the regular trains may be delayed and pass at uncertain intervals, and that wild or extra trains may be sent over the road, and they assume the risks of danger therefrom."

The cases approving this rule, both Federal and State, are almost unlimited. Among them are,

B. & O. Ry. Co. v. Baugh, 149 U. S., 368;
Coine v. Union Pacific Ry. Co., 133 U. S., 370;

N. & W. Ry. Co. v. Gesswine, 144 Fed., 56, 75 C. C. A., 214;

Connelly v. Pa. Ry. Co., 201 Fed., 54, 119 C. C. A., 392;

Davis v. Pa. & Reading Ry. Co., 276 Fed., 187;

Hammond v. Ry. Co., 83 Mich., 334;

Davis, Director General of Railroads, v. Powell, Special Court of Appeals of Virginia, decided Dec. 18, 1924, and reported in Vol. 1, Va. Spec. Court of Appeals Reports, 204.

The Virginia case of *Davis, Director General, &c., v. Powell*, arose under the Federal Employers' Liability Act, and defense was made on the ground of assumed risk. The court reached the conclusion that the plaintiff, a section laborer, assumed the risk, not only of trains approaching him without warning, but also of the negligent operation of the motor car upon which he was riding at the time.

Track men are employed to keep the track in repair for the safe movement of the trains. Transportation cannot be suspended while repair work is going on. "It is apparent," said the court in *Davis, &c., v. Powell, supra*,

> "that the work of repairing, and reaching the points where repairs are to be made, must be accomplished between the running of trains, and those engaged in this kind of work know this," citing *Coine v. Union Pacific Ry. Co.*, 133 U. S., 370.

The work is necessarily hazardous, and requires constant vigilance on the part of those engaged in it from the danger of passing trains:

> "When, therefore, a man contracts for such employment he knows, and takes on himself the risks and dangers incident to such dangerous work, and his assumption of those obvious and inevitable risks is, in the very nature of things, part of his employment. It follows, therefore, that the employer violates no legal duty to the employee in failing to protect him from danger which cannot be escaped by anyone doing such work."
>
> *Connelly v. Penn. Ry., supra.*

The evidence clearly shows that, applying the correct rule of law, Nixon assumed the danger existing at, and just prior to his death, so that his administratrix cannot recover therefor.

For the foregoing errors we now ask that a writ of certiorari issue as prayed for in the petition, in support of which this brief is filed, and that the case be reversed.

Respectfully submitted,

RANDOLPH HARRISON,
A. R. LONG,
S. H. WILLIAMS,
Counsel for Petitioner.

APPENDIX.

"Whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, * * * and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, or to proceed *in rem* * * *, and to recover damages in respect thereof, then and in every such case the person who, or the corporation * * * which, would have been liable, if death had not ensued, shall be liable to an action for damages * * *, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony."

Virginia Code of 1919, Section 5786.

"* * * The jury in any such action may award such damages as to it may seem fair and just, not exceeding ten thousand dollars, and may direct in what proportion they shall be distributed * * *."

Virginia Code of 1919, Section 5787.

"Every common carrier by railroad engaged in intrastate commerce shall be liable in damages to any of its employees suffering injury while he is employed by such carrier in such commerce, and in case of his death, to his personal representative, for such injury or death, resulting in whole or in part from, the wrongful act or neglect of any of the officers, agents, servants or employees of such carrier, or by reason of any defect or insufficiency, due to its neglect, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. If the action be for the death of an employee, sections 5787, 5788, 5789, and 5790 shall apply thereto as far as applicable. No action shall be maintained under this section, unless it be commenced within one year from the day the cause of action accrued.

Virginia Code 1919, Section 5791.

FILED
MAY 1 1926
WM. R. STANSBURY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 306

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
PLAINTIFF IN ERROR,

v.

ANNIE NIXON, ADMINISTRATRIX, &c.,
DEFENDANT IN ERROR.

REPLY BRIEF OF PLAINTIFF IN ERROR

RANDOLPH HARRISON,
A. R. LONG,
S. H. WILLIAMS,
Counsel for Petitioner.

J. P. BELL COMPANY, INC., PRINTERS, LYNCHBURG, VIRGINIA

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REPLY BRIEF OF PLAINTIFF IN ERROR

The recovery in this case being for an amount ($12,000.00) permissible only under the Federal Employers Liability Act, all questions affecting the rights of a licensee are irrelevant. The Federal act provides but one status for the decedent at the time of his injury, namely, an employee engaged in interstate commerce, and unless the decedent comes within the terms of the Act the verdict cannot be sustained.

The Supreme Court of Appeals of Virginia, however, sustained the recovery on the ground that the decedent was a licensee, and found it unnecessary to pass upon the defenses relied upon, namely, (1) that the defendant company owed the deceased, a track employee, no duty of lookout, and (2) that

the deceased assumed the risk of injury by passing trains operated without a lookout for him, the court saying,

> "Any discussion of the aforesaid positions, or the authorities cited in support thereof would be irrelevant, and therefore will not be entered upon."

If we are correct in our view that this verdict can only be sustained on the ground that the deceased was an employee engaged in interstate commerce, the foregoing defenses must be passed upon in determining the liability of the defendant.

1. The plaintiff in error owed no duty to the deceased, a track repairer employed in interstate commerce, to maintain a lookout for him, or to warn him of the approach of trains.

In addition to the authorities on this point cited and relied upon by the plaintiff in error in its petition and brief, see also,

C. N. O. & T. P. Ry. Co v. *Jones'* Admr. (Ky. 1916), 186 S. W., 897;

L. & N. RR. Co. v. *Vaughan* (Ky. 1924), 263 S. W., 721;

Carter v. *St. L. & S. F. Ry. Co.* (Mis. 1923), 249 S. W., 124;

Watts v. *P. M. Ry. Co.* (Mich. 1925), 203 N. W., 859.

In the case of *C. N. O. & T. P. Ry. Co.* v. *Jones' Admr., supra*, Jones was an employee, engaged in repairing the main line tracks of the railroad company under the direction of a foreman. While attempting to get out of the way of a passenger train, which approached without warning, he was struck and killed. Recovery was sought on the ground that the deceased was given no warning of the approaching train. The court disposed of this as follows (page 899):

> "It is true ordinarily that the employees of a railroad, while engaged in operating trains do not owe any duty of keeping a lookout nor of giving signals of approach nor of reducing the speed of the trains in anticipation of finding upon the track the employees, whose duty it is to keep the track in condition and free from obstacles which might

endanger the safety of the train and to watch for and know the time of the passing of the train. To such employees the trainmen owe the duty of exercising ordinary care to prevent injuring them when they are discovered in situations of danger only."

In the case of *L. & N. RR. Co.* v. *Vaughn*, *supra*, an employee was injured by being struck by a passenger train while riding on a handcar for her own convenience with the permission of the company. The plaintiff based her claim for damages on the ground that the permissive use of the handcar by the employee imposed a duty upon the railroad company of maintaining a lookout for such employees. The court disposed of this contention as follows (page 722):

"It is not every employee, much less licensee, that is entitled to be warned of approaching trains. The standard of care in this respect must be measured by the requirements of ordinary prudence in the practical operation of a railroad. The theory of the law is that the company owes precautionary duties to those whose presence is known or should be anticipated at a particular time and place. Without determining the precise relation which the occupants of the car bore to the company at the time of the accident, it is clear that they were out on the track without the knowledge of those in charge of the engine, or of any official whose duty it was to inform the engineer of their presence. Manifestly, it would seriously interfere with the operation of trains if mere knowledge of the custom of employees to use hand cars in going for their checks whenever it suited their convenience required the company always to be on the lookout for such employees, to have its trains under control, and to give reasonable warning of their approach. Therefore, as between the company and employees using hand cars for the purpose indicated, the more reasonable and practical rule, as well as the one fraught with less danger to human life, is to place upon such employees, who have the means of ascertaining when trains are approaching, the duty to keep a lookout and take the

> necessary precautions to keep out of the way of trains, not only for their own protection, but for the protection of those on the trains, rather than on the company which has no means of knowing at what particular time such employees may decide to make the trip."

In the case of *Carter* v. *St. L. & S. F. Ry. Co., supra*, the Missouri Supreme Court confirmed its former opinion on this point set forth in plaintiff's brief and held that "a man working on the track of the railroad must know that trains pass over the track and must look out for them and take care of his own safety."

In the case of *Watts* v. *P. M. Ry. Co., supra*, a section man was killed while operating a handcar on the mainline of the railroad, and the decisive question in the case was that now before the court, whether the railroad company owed the railroad man a duty of lookout.

The court decides this question as follows (page 860):

> "The question so presented is not new. There runs through plaintiff's claim and argument the vein of the humanitarian doctrine and while this is quite appealing in a broad sense, it overlooks the fact that this doctrine avails little unless it appears the peril of the section hand was discovered in season to have averted injury to him."

2. The deceased, a track repairer employed in interstate commerce, assumed the risk of injury from trains operated without a lookout for him:

On this point the Supreme Court of Michigan, in the case of *Watts* v. *P. M. Ry. Co., supra*, held that section men assumed the risk incident to the running of trains without warning, and cited in support of that proposition, the extract from Elliott on Railroads, quoted on page 22 of the plaintiff in error's brief.

This point has recently been decided in the case of *Gilmer* v. *Y. & M. V. Ry. Co.* (C. C. A. 1925), 4 Fed. (2d), 963

(certiorari denied). There the deceased who was a flagman on an interstate railroad was struck and killed while crossing the yards of the company at the end of his run by being struck by a shifting freight car. Negligence was claimed as to the method of shifting cars and in the company's failure to have the yard properly lighted, while defense was made that Gilmer's death was due solely to his own negligence and to an assumed risk of employment.

The court sustained the defense of assumption of risk, holding it to be immaterial whether the company was negligent or not.

> "Plaintiff's intestate was an experienced railroad employee and the conclusion is inescapable that he was thoroughly familiar with the custom of the yard to switch cars without requiring them to be provided with a lookout or to have lights upon them so as to furnish warnings of danger. He was bound to know from his experience that the precautions against injury now insisted upon did not prevail in defendant's yard and that it might be expected at any time, day or night, that a car would be moved without warning of any kind. . . . In *Boldt* v. *P. R. Co.*, 245 U. S. 441, 62 L. ed. 385, a case quite similar to this it is said: 'At common law the rule is well settled that a servant assumes extraordinary risks incident to his employment or risks caused by the master's negligence which are obvious or fully known and appreciated by him'." (Page 964.)

The case of *S. A. L. Ry. Co.* v. *Koennecke*, 239 U. S., 352, cited by the defendant in error, was not a case of a main line track repairer, but of a "switchman" performing duties in the railroad yard, and is not in point.

In the case at bar there was no violation of a statutory requirement, or failure of compliance with any orders or rule of the plaintiff in error, adopted for the safety of employees. There was no rule requiring the engineman and fireman to keep

a lookout for track men. Record (print), pages 66-68. On the contrary there could be no rule requiring a lookout for track men, because it would be impossible to know when, or where to look for them. Record (print), pages 173-174.

The uncontradicted evidence was that section men were instructed to keep a constant lookout for their own protection against passing trains. The plaintiff's intestate, an experienced section man, knew this, and such were the instructions given by him to the section men employed under him.

The witness Rose, one of the section force, testified as follows:

> "Q. What instructions did Mr. Nixon give you, if any, in respect to the section men looking out for trains?
>
> A. He would caution us, and tell us to look out for trains; to be very particular about that, and for some one to watch one way and some the other.
>
> Q. Did you all understand that trains might come along the track at any time?
>
> A. Most any time.
>
> Q. Was that your experience, that trains would come along the track at any time?
>
> A. Yes, sir.
>
> Q. You didn't know when they were coming?
>
> A. No, sir.
>
> Q. Did you expect the train men to be looking out for you, or did you look out for the trains.
>
> A. We looked out for the trains." Record (print), page 127.

Shipman, another member of the section force, testified as follows:

> "Q. What were the instructions given to the men in regard to looking out for trains while at work on the track?
>
> A. To look out all the time, and if we see a train coming to set the car off. That is what he told the men.
>
> Q. Did you know that a train might come at any time?

A. Yes, sir." Record (print), pages 146-147. See also page 174.

The section men were likewise instructed that the engineman does not maintain a constant lookout ahead; that when necessary to signal a train to stop they must act on the assumption that the engineman was not looking out, and give the signal by torpedoes in addition to the red flag, and that it was incumbent upon them always to exercise constant vigilance to avoid being struck and injured by passing trains. Record (print), pages 173-174.

Track men are employed to keep the track in repair for the safe movement of trains, and the duty necessary devolves upon them to keep a constant lookout for their own safety. So far as section men are concerned, therefore, the train crew have a right to expect a clear track and the railway company is under no duty to anticipate the presence of a track man and of warning him of the approach of a train.

If the servants operating this train had actually discovered the deceased in a position of peril, and apparently unaware of his danger, the most elementary principles of law and humanity would have required that they should do all that the time would admit to avoid injuring him. But there was no evidence to bring this principle of law into application.

Respectfully submitted,

RANDOLPH HARRISON,
A. R. LONG,
S. H. WILLIAMS,
Counsel for Petitioner.

Office Supreme Court, U. S.
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IN THE

Supreme Court of the United States

MARCH TERM, 1926.

No. 306

THE CHESAPEAKE & OHIO RAILWAY CO.,
PETITIONER,

vs.

ANNIE NIXON, ADMINISTRATRIX OF THE ESTATE OF SAM JOE NIXON, DECEASED.

REPLY BRIEF OF ANNIE NIXON, ADMINISTRATRIX OF THE ESTATE OF SAM JOE NIXON, Deceased.

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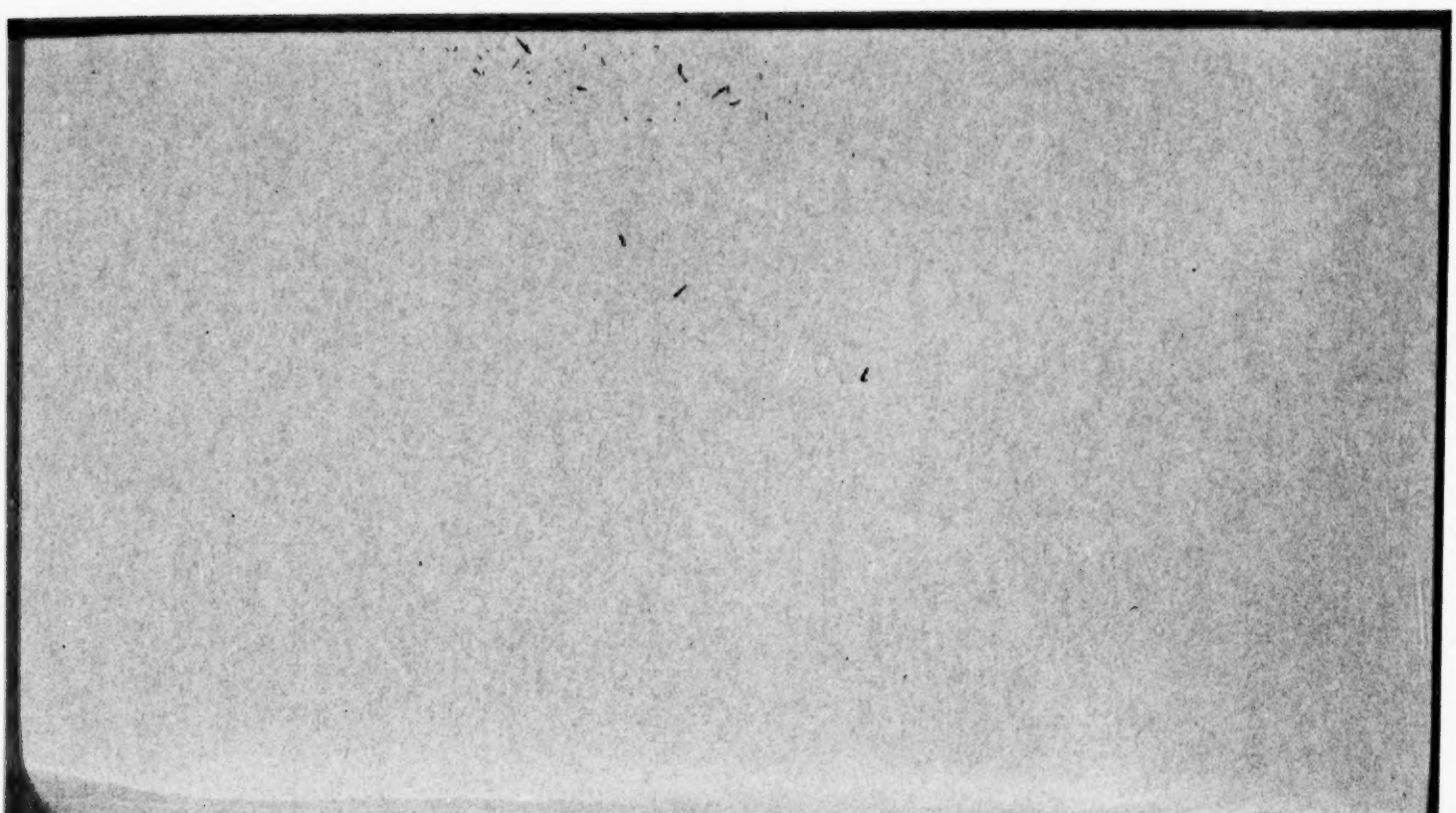

IN THE

Supreme Court of the United States

MARCH TERM, 1926.

No. 966.

THE CHESAPEAKE & OHIO RAILWAY CO.,
PETITIONER,

vs.

ANNIE NIXON, ADMINISTRATRIX OF THE ESTATE OF SAM JOE NIXON, DECEASED.

REPLY BRIEF OF ANNIE NIXON, ADMINISTRATRIX OF THE ESTATE OF SAM JOE NIXON, Deceased.

The only specifications of error assigned by the petitioner are as follows:

1. The Supreme Court of Appeals of Virginia erred in affirming the action of the trial Court in refusing petitioner's instruction on the duty of maintaining a lookout for track men employed in interstate commerce.

2. The Supreme Court of Appeals of Virginia erred in affirming the action of the trial Court in refusing petitioner's instruction on the assumption of risks by track men employed in interstate commerce.

The instruction complained of and which was refused by the trial Court is as follows:

> "The Court instructs the jury that the employees of a railway company engaged in the maintenance and repair of a railroad track, whose business it is to keep the track in safe condition for the movement of trains, must maintain a lookout at all times for the approach of such trains and for their own safety, and the employees operating such

trains have the right to assume that the track employees will keep the track free from obstructions, and consequently they owe no duty to such track employees of maintaining a lookout for them or of warning them of the approach of the trains."

It is respectfully submitted that the Supreme Court of Appeals of Virginia did not err in affirming the action of the trial court in refusing the above instruction; because Nixon at the time he was killed was not "engaged in the maintenance and repair of a railroad track," but was a servant on his master's premises on his way to begin work, due to arrive at the starting point a reasonable time, to wit, fifteen (15) minutes before the hour of commencement, using for his transportation the railroad track and a tricycle belonging to the Company which he had the express leave, permission, allowance or license of the Company to use. He was therefore at the instant of the accident both a servant (and as to the mode of travelling) a licensee.

So far as his position on the track was concerned he might have been a clerk, station agent, or servant of any kind in the employment of the Company.

In addition the rules of the Company required the Engineman and fireman to keep a lookout ahead at all times and it was their failure to keep such lookout that caused the accident.

Transcript of Record, page 67.

C. J. GEYER, DIVISION ENGINEER, FOR THE C. & O. R. R. Co.

Cross-examined by Mr. Drysdale:

"Q. Now, what do you know about the duties of an engineer with respect to keeping a lookout?

A. The general rule in the rule book is that the engineer and fireman shall keep a lookout ahead.

Q. That is the general rule?

A. Which is in the rule book."

* * * * * * *

"Q. Now, I want to be sure that we understand this thoroughly, it is the duty of the engineer to keep a constant lookout ahead except as he is prevented from doing that by other imperative duties, in other words, duties of more importance, that is correct, isn't it?

A. Yes, sir, that is in the rule book."

* * * * * * *

Transcript of Record, page 73.

"Q. Now suppose the only object of the engineer was, not because his engine imperatively demanded this oil, but he wanted to put this oil in his engine, before the engine reached Gladstone rather than have it spilled at Gladstone, you wouldn't call that an imperative duty to keep him from looking out, would you?

A. If that was a fact I wouldn't say it was."

The second assignment of error relates to the trial Court's refusal to give the following instructions on the assumption of risk by track men employed in interstate commerce, this instruction which was refused by the trial court is as follows:

"The Court instructs the jury that an employee of a railway company in accepting employment as a section foreman thereon, assumes all the ordinary risks that are necessarily and normally incident to the occupation in which he engages, whether the employee is actually aware of such risks or not. And if the jury believe from the evidence that the railway company customarily ran its trains over its track at or near the point of the accident in question at any time in either direction, and without maintaining a lookout for track men at such times as the engineer and fireman were engaged in the performance of necessary duties about the engine, then they are instructed that the plaintiff's intestate likewise assumed the risk of danger from such cause, and the plaintiff cannot recover in this action."

It is submitted that the Supreme Court of Appeals of Virginia did not err in confirming the trial Court's refusal to give the above instruction for these reasons:

There was no evidence to show that the train crews habitually disobeyed the lookout rule and none to show that if they did Nixon was aware of it.

Nixon did not assume the risk of the negligence of his fellow servants the engineman and fireman of the train and the whole evidence showed beyond the peradventure of a doubt that it was their negligence in failing to keep a lookout that caused the accident resulting in the death of Nixon.

In its support of its specifications of error, numerous cases have been cited but it is respectfully submitted that the cases relied on by the petitioner are cases governing the liability of interstate carriers to their employees growing out of yard movements of their trains and engines and that the instant case should be governed by the principles announced by this Court in *Seaboard Air Line Railway* vs. *Beauregard Magdalene Koennecke*, 60 Law Ed. p. 324; 239 U. S. p. 352.

In the present case the evidence is undisputed, that the deceased was engaged in interstate commerce, that he was engaged in main line work, that the rules of his company required the constant lookout to be kept and as was said in the Koennecke case:

> "We see equally little ground for the contention that there was no evidence of negligence. It at least might have been found that Koennecke was killed by a train that had just come in and was backing into the yard, that the movement was not a yard movement, that it was on the main track, and that there was no lookout on the end of the train and no warning of its approach. In short, the jury might have found that the case was not that of an injury done by a switching engine known to be engaged upon its ordinary business in a yard, like *Aerkfetz* v. *Humphreys*, 145 U. S. 418, 36 L. Ed. 758, 12 Sup. Ct. Rep. 835, but one where the rules of the company and reasonable care required a lookout to be kept. It seems to us that it would have been impossible to take the case from the jury on the ground either that there was no negligence or that the deceased assumed the risk."

It would seem clearly that the question was one solely for the jury and that the judgment of the Supreme Court of Appeals of Virginia should be affirmed.

All which is respectfully submitted.

DUNCAN DRYSDALE,
AUBREY E. STRODE,
Counsel for Annie Nixon, Administratrix of the Estate of Sam Joe Nixon, deceased.

ACKNOWLEDGMENT OF SERVICE OF BRIEF.

The undersigned hereby acknowledge legal service of the foregoing reply brief of Annie Nixon, Administratrix of the Estate of Sam Joe Nixon, Deceased, who is defendant in a writ of certiorari now pending in the Supreme Court of the United States.

Given under our hands this 22nd day of April, 1926.

RANDOLPH HARRISON,
A. R. LONG,
S. H. WILLIAMS,
Counsel for Chesapeake & Ohio Railway Co.

SUPREME COURT OF THE UNITED STATES.

No. 306.—October Term, 1925.

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The Chesapeake and Ohio Railway Company, Petitioner, *vs.* Annie Nixon, Administratrix of the Estate of Sam Joe Nixon, Deceased.	On Writ of Certiorari to the Supreme Court of Appeals of the State of Virginia.

[May 24, 1926.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit to recover damages for the death of the plaintiff's husband, the intestate, from the Railroad Company upon whose tracks the death occurred. The plaintiff, (the respondent here,) obtained a verdict and judgment in the trial Court and upon a writ of error the judgment was affirmed by the Supreme Court of Appeals of Virginia. — Va. —. As the recovery was based upon the Employers' Liability Act of April 22, 1908, c. 149, § 1, 35 Stat. 65, the death having occurred in interstate commerce, a writ of certiorari was granted by this Court to review certain questions of law that arose in the case. 267 U. S. 590.

The deceased was an experienced section foreman upon the defendant's road. One of his duties was to go over and examine the track and to keep it in proper repair. When inspecting the track he used a three wheeled velocipede that fitted the rails and was propelled by the feet of the user. He had obtained from his immediate superior, the Supervisor of Track, leave to use the machine also in going to his work from his house, about a mile distant, over a part of the track that was in his charge. His work began at seven in the morning and at half-past six on the day of his death he started as usual. Five minutes later he was overtaken by a train and killed. For reasons that the jury found insufficient to excuse the omission the engineer and fireman of the train were not on the lookout, and the question raised is whether

as toward the deceased the defendant owed a duty to keep a lookout, or whether on the other hand the deceased took the risk.

If the accident had happened an hour later when the deceased was inspecting the track, we think that there is no doubt that he would be held to have assumed the risk, and to have understood, as he instructed his men, that he must rely upon his own watchfulness and keep out of the way. The Railroad Company was entitled to expect that self-protection from its employees. *Aerkfetz* v. *Humphreys*, 145 U. S. 418; *Boldt* v. *Pennsylvania R. R. Co.*, 245 U. S. 441, 445, 446. *Connelly* v. *Pennsylvania R. Co.*, 201 Fed. Rep. 54; *Davis* v. *Philadelphia & R. Ry. Co.*, 276 Fed. Rep. 187; *Pennsylvania R. R. Co.* v. *Wachter*, 60 Md. 395; 4 Elliott on Railroads, 3d ed., § 1862. The duty of the railroad company toward this class of employees was not affected by that which it might owe to others.

The permission to use the velocipede in going to his work did not make the defendant's obligation to the deceased greater than it would have been after he got there. We assume that it was as effective to make the use of the car lawful as would have been a stockholder's vote spread upon the records of the company. But the implications are not necessarily the same. It was a trifling incident of daily life by which a subordinate officer of the company allowed one lower in grade to enlarge his customary use of the machine by an hour for his own convenience, although even then, in the opinion of the Court of Appeals of Virginia, already engaged in his duties. It seems to us to have been no more than an extension of his ordinary rights and his usual risks.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.